84-1539 (1)

No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PEOPLE OF THE STATE OF MICHIGAN,
Petitioner,

v.

RUDY BLADEL,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

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QUESTIONS PRESENTED

Rudy Bladel was convicted by jury trial for the murders of three individuals. Admitted at trial was a statement made by Respondent during custodial interrogation. The interrogation occurred after arraignment in the State District Court wherein Respondent requested court appointed counsel. Respondent was advised of and waived his "Miranda Rights" prior to making the statement. The Michigan Supreme Court found that the interrogation violated Respondent's Sixth Amendment right to counsel and reversed the convictions. The questions presented are:

1. Whether the Michigan Supreme Court erred when it held that police interrogation of a criminal defendant after District Court arraignment was a critical stage in the proceedings such that the Sixth Amendment right to the presence of counsel is applicable?

2. Whether the Michigan Supreme Court erred in holding that the Sixth Amendment of the United States Constitution requires a "bright line" rule prohibiting police initiated interrogation after a criminal defendant has requested appontment of counsel at initial arraignment?

3. Whether the interests protected by the Sixth Amendment right to counsel and the "Fifth Amendment right to Counsel" during interrogation are sufficiently similar such that a knowing and intelligent waiver of Fifth Amendment "standard Miranda Rights" also constitutes a knowing and intelligent waiver of criminal defendant's then existing Sixth Amendment rights?

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The Jackson County Michigan Prosecutor, on behalf of the People of the State of Michigan, petitions for a Writ of Certiorari to review the Judgment and Opinion of the Supreme Court of the State of Michigan, rendered in these proceedings and released on January 29, 1985.

OPINIONS BELOW

The Opinion of the Michigan Supreme Court, as yet unreported, appears as Appendix A, *infra,* pp. 1-41. The Michigan Supreme Court's prior remand order is published at 413 Mich. 864; 317 NW2d 855 (1982). The Opinions of the Michigan Court of Appeals are published

at 106 Mich. App. 397; 308 NW2d 230 (1981) and 118 Mich. App. 498; 325 NW2d 421 (1982). The Opinion of the Circuit Court was neither published nor written, but a copy of the relevant portion of the transcript of the Circuit Court proceedings appears as Appendix B.

JURISDICTION

The judgment of the Michigan Supreme Court was released on January 29, 1985. See Appendix A, *infra,* p. i. This Petition was filed less than 60 days from the date aforesaid. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment VI:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel in his defence."

Constitution of the United States, Amendment XIV, Section 1:

> ". . . nor shall any state deprive any person of life, liberty, or property without due process of law . . ."

STATEMENT OF THE CASE

Respondent was convicted of the December 31, 1978 shotgun slayings of three railroad employees at the train depot in Jackson, Michigan. Respondent, a prime suspect in the slayings, was questioned by the police on January 1, 1979 and January 2, 1979. Before each interview Respondent was advised of his "Miranda rights" which he waived each time. (WHT 5, 8, 10 T 528, 532). During the first interview Respondent admitted that he was present in Jackson on December 31. (WHT 9, T 530). In the second interview he admitted that he had gone into the

train depot on the day of the murders, but did not admit any involvement in the murders. (WHT 11-15, T 533-537).

There was no further police contact with Respondent until March of 1979 when a shotgun was found on the outskirts of Jackson and was scientifically determined to be the murder weapon. Federal firearms records showed that Respondent had purchased the shotgun in Indiana. (T 538). A warrant was issued for the arrest of Respondent. He was arrested in Elkhart, Indiana on March 22, 1979. (WHT 15). Respondent waived extradition from Indiana. (T 539, WHT 22-23). During the waiver hearing, Respondent was advised of, but declined, the right to representation by counsel. (T 539, 572, 683-684, WHT 22-23).

Respondent was not questioned about the crime until he arrived back in Jackson on the 22nd. That evening, from 9:21 p.m. until 10:47 p.m., Respondent was interviewed by Jackson police. (T 540-575). Prior to this interview, Respondent was advised of his rights including his right to consult a lawyer before answering any questions, to have a lawyer present during questioning, the right to have an attorney appointed and an absolute right to stop the questioning at any time. (T 541-542, WHT 16-19). Detective Rand also read to Respondent a written rights form which Respondent also read. Respondent signed the acknowledgment and waiver portion of the advice of rights form (indicating that he would talk to the police), waiving the presence of an attorney. (T 542, WHT 19). This questioning was terminated when Respondent failed to answer any further questions. (T 545, WHT 21).

The Respondent was arraigned in District Court on March 23, 1979, at about 10:35 a.m., in the presence of Detective Rand. (District Court Arraignment p 2). The pertinent events at arraignment are recorded as follows:

> THE COURT: Now, because these are very serious charges which are brought against you, you have a

right to be represented by an attorney, at all stages of the proceedings, including the preliminary examination I just mentioned. If you want one. If you cannot afford an attorney, then you may petition the Circuit Judge of this County for the appointment of an attorney to represent you at public expense. Now my first question to you is this. Do you intend to retain your own attorney?

THE DEFENDANT: I don't have the money.

THE COURT: Do you wish to have one appointed for you?

THE DEFENDANT: Yes, sir.

THE COURT: All right sir. I'll place an affidavit in the file for you to make out for that purpose. Until you have a chance to talk with an attorney, the Court would strongly recommend that you stand mute, that means say nothing. If you do this, the Court will enter a plea of not guilty for you and set the matter for preliminary examination. Is that what you wish to do?

THE DEFENDANT: Right sir.

(Arraignment Transcript p 4).

On March 26, 1979, Sergeant Richard Wheeler and Lieutenant Ronald Lowe interviewed the Respondent in the County Jail. (T 589, WHT 31). The Respondent was given a copy of an advice of rights form to read while Wheeler read another copy to Respondent. (WHT 32). The Respondent was advised of each right individually. (WHT 33-34). He responded affirmatively when asked if he understood each right. (WHT 33-34). Respondent was then read the waiver portion of the form, which he indicated he understood. Respondent signed the waiver and said he did not want an attorney present at that time. (WHT 34). At no time during the interview did the Respondent ask to have an attorney present or to contact an attorney. (WHT 35). Neither Wheeler nor Lowe were

aware of Respondent's request for appointment of counsel made at arraignment until Respondent told them at the point during the advice of rights when counsel is mentioned. (WHT 39-40). Respondent was then specifically asked if he wanted an attorney present at that time and the Respondent stated, "No." (WHT 41). Wheeler testified that when the Respondent mentioned that he had asked for court appointed counsel Wheeler asked Respondent if he wanted an attorney present, to which Respondent replied, "I do not need one." (WHT 43). Lieutenant Lowe testified to this recollection of the events:

> Mr. Bladel at this time stated that he had requested an attorney at his arraignment, but he hadn't seen him, seen the attorney yet, that he would talk to us, and he said he would talk to us, and he said he didn't need his attorney there while he was talking to us. (WHT 47).

• • •

> Q: Was there any mention of an attorney at this time?
>
> A: I asked him if he desired his attorney present and he stated he did not need one.
>
> Q: What, if anything, further took place then?
>
> A: In addition to the last statement that Mr. Bladel said, when I asked him if he needed his attorney present he stated, 'I don't need him present. I'm going to plead guilty anyway.' (WHT 54).

During this interview, Respondent confessed to the three murders.

Respondent did not have any contact with his attorney until the day after his confession. (WHT 67-68). In addition to the times he was advised of his rights in connection with this case, Respondent had been advised of his rights previously and was aware of his rights from this past experience. (WHT 71).

History of Raising of Federal Questions

Respondent preserved his challenge to the constitutionality of the confession by way of a pre-trial "Motion to Suppress or in the Alternative for a Walker* Hearing." The hearing was granted and held on July 5, 1979. After hearing the testimony at the *Walker* hearing, the trial court found the confession admissible:

> Now I understand the position of the Defendant to the effect that he did demand counsel on March 23 at his arraignment in District Court. Now, whether or not counsel was appointed by March 26, incidently March 23, 1979 was a Friday and March 26, 1979 was a Monday, and, whether or not counsel had been appointed and had an opportunity to consult with the defendant before the interrogation does effect the voluntariness and the effectiveness of the waiver of the rights.
>
> Now, I don't know of any case why (sic) counsel had been appointed but hadn't had a chance to consult with the defendant before he was again interrogated and didn't have a chance to either advise the defendant that he should not say anything without the presence of counsel. But, there is no case that I know of that says *Miranda* goes that far so the holding is that the testimony or the substance of the statements of all three occasions and the confessions will be admissible. (WHT 108-109). (Appendix B, *infra*).

The constitutional question was raised in Respondent's appeal of right to the Michigan Court of Appeals, which affirmed following the reasoning of the Fifth Circuit cases of *Nash* v. *Estelle,* 597 F2d 513 (5th Cir. 1979) and *Blasingame* v. *Estelle,* 604 F2d 893 (5th Cir. 1979). *People* v. *Bladel,* 106 Mich. App. 397; 308 NW2d 230 (1981). The Michigan Supreme Court, in lieu of granting Respondent's Application for Leave to Appeal, remanded to the Court of

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* *People* v. *Walker,* 374 Mich. 331 (1965), see motion, Appendix C, *infra.*

Appeals for reconsideration in light of *People* v. *Paintman* and *People* v. *Conklin,* 412 Mich. 518; 315 NW2d 418 (1982), decided in the interim, which adopted this Court's holding in *Edwards* v. *Arizona, infra. People* v. *Bladel,* 413 Mich. 864; 317 NW2d 855 (1982). On remand, the Court of Appeals summarily reversed concluding that *Paintman* and *Conklin, supra,* read in light of the remand order "compelled" reversal. *People* v. *Bladel,* 118 Mich. App. 498; 325 NW2d 421 (1982).

The Michigan Supreme Court granted Petitioners Application for Leave to Appeal on the issue that the confession in the instant case was not taken in violation of Respondent's Fifth Amendment rights. The Michigan Supreme Court agreed that Respondent's Fifth Amendment rights were not violated, but held that Respondent's Sixth Amendment rights were violated by police-initiated interrogation after Respondent had requested court appointed counsel at his initial arraignment. *People* v. *Bladel* slip opinion Appendix A p. 18. The Court concluded that the Sixth Amendment precludes further police-initiated interrogation after a request for counsel is made to a judicial officer by "analogy" to this Court's case of *Edwards* v. *Arizona, infra,* which requires such preclusion under the Fifth Amendment where the defendant requests counsel during custodial interrogation.

REASONS FOR GRANTING THE WRIT

1. Conflicting decisions by both Federal and State courts require this Court's resolution of the questions presented by Petitioner.

It is imperative that this Court address the issues raised in this Petition. The issues are ones of substantial questions of Federal Constitutional Law. Lower State and Federal courts have reached differing, and in some cases diametrically opposed results. A final, authoritative ruling is needed. (See Appendix A, page 41).

This Court has not previously addressed the specific issues raised in this Petition. Only this Court has the authority to render a conclusive and binding decision as final arbiter of the United States Constitution. *Marbury* v. *Madison,* 5 U.S. (1 Cranch) 137 (1803); *McCulloch* v. *Maryland,* 17 U.S. (4 Wheat) 316 (1819).

Essentially, the holdings of the Michigan Supreme Court in this case are that (1) a request at District Court arraignment for the appointment of counsel is an invocation by Defendant of his Sixth Amendment right to counsel, and that (2) the Sixth Amendment requires a "bright line" rule prohibiting police initiated interrogation after Defendant has invoked his Sixth Amendment right to counsel at District Court arraignment. The Michigan Supreme Court's holding that a request for counsel at arraignment prevents further police initiated interrogation is the first such decision according to Petitioner's research. This analogous extension of the rule of *Edwards* v. *Arizona,* 451 US 477; 101 SCt 1880; 68 LEd2d 378 (1981), is contrary to the holdings of other cases.

The recent Georgia Supreme Court case of *Ross* v. *State,* 36 CrL 2413 (3-6-85) dealt with the same issues presented in the instant case. There, Defendant Ross had spoken with police on several occasions. Two days after his last statement to police, Ross made his "first appearance" before a Magistrate. This appearance was in a non-adversarial setting and therefore the Georgia Supreme Court concluded that the Sixth Amendment right to counsel had not attached, relying on this Court's case of *United States* v. *Gouveia,* —— US ——, 104 SCt 2292, 81 LEd2d 146 (1984). At that initial appearance, Defendant Ross declined the appointment of counsel but asked for additional time within which to retain his own counsel. The Georgia Supreme Court, in responding to Defendant Ross's Fifth Amendment claim, ruled as Petitioner contended in the Michigan Supreme Court, that in light of the fact that the defendant had never requested counsel

while being interrogated by police nor did he request that interrogation cease for any reason and defendant did not at this first appearance indicate an intention not to deal with police except through counsel, *Edwards* v. *Arizona* is not applicable. Under the circumstances of the *Ross* case, voluntariness of the confession must be determined under *North Carolina* v. *Butler,* 441 US 369; 99 SCt 1755; 60 LEd2d 286 (1979) rather than under the per se rule of *Edwards* v. *Arizona.* The Georgia Supreme Court's holdings are in conflict with the instant case.

In *Johnson* v. *Commonwealth,* 255 SE2d 525 (VA 1979), the Virginia Supreme Court reaffirmed its prior holding that "police may question an accused who has counsel, retained or appointed, whether or not the attorney is present." *Johnson, supra,* 255 SE2d at 531. The *Johnson* facts are on all fours with the case at bar. Johnson was arrested, advised of his rights, waived those rights and spoke with police. The following day Johnson was arraigned, claimed indigency, requested and was granted court appointed counsel. After arraignment, an officer, unaware of request for counsel at arraignment, interviewed defendant after advice and waiver of Miranda rights. The Virginia Supreme Court concluded that, under these facts, Johnson's ability to exercise his right to counsel was scrupulously honored under *Michigan* v. *Mosley,* 423 US 96; 96 SCt 321; 46 LEd2d 313 (1975) and therefore the confession was properly admitted.

The Fifth Circuit addressed this issue in several cases including *Jordan* v. *Watkins,* 681 F2d 1067 (CA 5, 1982). In *Jordan,* defendant had been appointed counsel before he confessed during police initiated interrogation. The court found *Edwards* inapplicable. *Edwards* was interpreted as prohibiting police conduct which "impinged on the exercise of the suspect's continuing right to cut-off interrogation." *Jordan, supra,* 681 F2d at 1073, quoting from *Blasingame* v. *Estelle,* 604 F2d 893 (Fifth Circuit

1979). The *Jordan* Court rejected defendant's Fifth and Sixth Amendment challenges, finding defendant's experience and advice and waiver of Miranda rights sufficient for a knowing, intelligent and voluntary waiver of Fifth and Sixth Amendment rights to the presence of counsel.

Several other cases have dealt with the implications of police-initiated interrogation after a request for counsel at arraignment. These cases address the direct holdings of the Michigan Supreme Court and the implicit holding that Miranda warnings are inadequate for establishing a knowing, intelligent and voluntary waiver of the Sixth Amendment right to the presence of counsel during interrogation. Petitioner requests that this Court review the implicit holding as well as the explicit holdings of the Michigan Supreme Court so that a complete resolution of the case made be had. (Many of the cases which have ruled on the relevant issues are capsulized in Appendix D.)

2. The Michigan Supreme Court, in deciding that the Sixth Amendment required, by analogy to *Edwards* v. *Arizona*, that police be prohibited from initiating interrogation after a defendant has requested counsel at arraignment, ruled inconsistently with prior decisions of this Court and this Court would probably decide the issues presented differently.

Despite the Michigan Supreme Court's accurate understanding that a request for counsel at arraignment does not have Fifth Amendment implications, that court nonetheless applied the rule of this Court's Fifth Amendment case of *Edwards* v. *Arizona,* 451 US 477; 101 SCt 1880; 68 LEd2d 378 (1981). Rather than being an analogous application of the *Edwards* rationale, the Michigan Supreme Court directly applied the result of *Edwards* to an analytically distinct circumstance, resulting in a perversion rather than a progression of the *Edwards* rationale.

This Court limited its analysis of *Edwards* to the Fifth Amendment. *Edwards* v. *Arizona, supra,* 451 US at 480 n.7; 101 SCt at 1883 n.7. The Michigan Supreme Court, however, found the analysis of the instant case to be confined to the Sixth Amendment. (See Appendix A, page 11a). The Fifth and Sixth Amendment rights are separate and distinct requiring different analyses. *Rhode Island* v. *Ennis,* 446 US 291, 300 note 4; 100 SCt 1682, 1689 note 4; 64 LEd2d 297 (1980). Rather than applying the reasoning of *Edwards* by analogy, the Michigan Supreme Court merely adopted the identical rule of *Edwards* in this distinct Sixth Amendment setting. For such a direct adoption of the rule under the Fifth Amendment to be appropriate in this Sixth Amendment case, the circumstances of the invocation of the Sixth Amendment right must be the same as the invocation of the Fifth Amendment right and the interest protected by both rights must also be identical.

The progression of a logical analysis of this case must begin with the underlying principles and protections afforded by the Fifth Amendment, followed by a close examination of how *Edwards* v. *Arizona* protects those Fifth Amendment rights and then an examination of the Sixth Amendment followed by application of *Edwards* to the Sixth Amendment setting to see if the Fifth Amendment remedy is appropriate in this Sixth Amendment case.

The Fifth Amendment right to counsel is a narrow one. It is the right to "confer with or have counsel present before answering any questions" during custodial interrogation. *Blasingame* v. *Estelle,* 604 F2d 893, 896 (CA 5) (1979). The Fifth Amendment right to counsel was fully developed by this Court in *Miranda* v. *Arizona,* 384 US 436; 86 SCt 1602; 16 LEd2d 694 (1966). The *Miranda* case essentially applied the principles which formed the basis for the Fifth Amendment right against compelled testimony (belief that compelled testimony is inherently unreliable and that Star Chamber style compulsion of a

defendant to give evidence which "makes" the state's case against the individual offends our sense of justice) to the setting of custodial interrogation with its presumed inherent, psychological compulsion. *Oregon* v. *Elstad,* —— US ——; 53 LW 4244, 4247 (3-5-85). The *Miranda* court ruled that custodial interrogation could only produce voluntary statements when the confessor has knowingly and intelligently waived his expanded Fifth Amendment rights. The Court found essential to the protection of these rights, the right to the presence of an attorney during custodial interrogation. However, the right to counsel can also be waived. The *Johnson* v. *Zerbst,* 303 US 458; 58 SCt 1019; 82 LEd 1461 (1937) standard is presumptively met by advise and waiver of "Miranda warnings." The Fifth Amendment right to counsel protects defendants in the exercise of their right to remain silent assuring that any statements are not obtained through coercion or trickery. *Berkemer* v. *McCarty,* —— US ——; 104 SCt 3138, 3150 n.27; 82 LEd2d 317 (1984).

In light of the narrow scope of the Fifth Amendment right to counsel, an assertion of that right by a criminal defendant is equally narrow. When a defendant requests counsel during custodial interrogation, it is clearly the defendant's will not to speak to police without the presence of counsel. The invocation of the Fifth Amendment right to counsel is no less and no more than precisely that.

The narrow scope of the Fifth Amendment right to counsel is the key to a right understanding of *Edwards* v. *Arizona, supra.* In *Edwards,* the defendant made a request for counsel to police during interrogation. *Edwards, supra,* 451 US at 479; 101 SCt at 1882. The next morning, a guard came to Edwards' cell to inform him of the detectives' desire to talk to him. Edwards replied that he did not want to talk, but the guard told him that he had to. *Edwards, id.* The guard took Edwards to meet with the detectives. Edwards was advised of his "Miranda

rights," which he waived, then Edwards confessed. *Edwards, id.*

Mr. Justice White's Opinion in *Edwards* focused on what constitutes a knowing and intelligent relinquishment or abandonment of a known right or privilege. *Edwards, supra,* 451 US at 482; 101 SCt at 1884. A defendant cannot, in the legal sense of voluntariness, waive his right to counsel unless he knows and fully understands that right. Police conduct in the *Edwards* case brought into question whether the relinquishment of the right to counsel was knowing and intelligent. The effect of the Miranda Rule is to make the police the legal advisor of a defendant in the initial phase of custodial interrogation. Thus, Edwards was depending on the police as the source of his knowledge of his legal rights. Edwards certainly could have been confused as to what his rights were because of inconsistent police conduct.

The initial cessation of interrogation upon Edwards' request for counsel would indicate to Edwards that the right to the presence of counsel truly did exist and that the police would honor that right. However, the later reinterrogation (especially in light of the comment of the jailer that Edwards must talk) was at least an implicit statement by the police that defendant did not have the right to the presence of counsel at interrogation or at the very least that they would not honor that right if it existed. This inconsistent police conduct could bring confusion into the defendant's mind precluding a knowing and intelligent waiver.

Additionally, the waiver in *Edwards* is drawn into question because police initiated reinterrogation is a request by police that the defendant abandon in its totality the very specific and narrow right to the presence of counsel that the defendant had previously invoked. Inconsistent behavior is asked of the defendant. Thus, the voluntari-

ness of this confession is called into question because any change of mind by defendant has come at the behest of the police. Police initiated interrogation after a defendant's request for counsel, violates the rule of Miranda that if an accused requests the presence of counsel, "the interrogation must cease until an attorney is present." *Miranda, supra,* 384 US 474; 86 SCt 1627. Reinterrogation in these circumstances directly impinges upon the defendant's Fifth Amendment right to the presence of counsel as established in Miranda. As recognized by this Court in Edwards, the request made by Edwards "expressed his desire to deal with the police only through counsel..." *Edwards, supra,* 451 US 486; 101 SCt 1885. The reappearance of police without the presence of counsel, impinged on that right. Police initiated interrogation after the invocation of the Sixth Amendment right to counsel by request for court appointed counsel at arraignment does not so impinge on a defendant's rights.

The scope of the Sixth Amendment right to counsel is very different from that of the Fifth Amendment right to counsel. The Sixth Amendment right to counsel is the right to have an attorney appointed to represent the defendant through the judicial proceedings once they have reached a critical state. *Brewer* v. *Williams,* 430 US 387, 398; 51 LEd2d 424; 97 SCt 1232, 1239 (1977). *United States* v. *Gouveia,* —— US ——; 104 SCt at 2292 (1984). The Sixth Amendment right to counsel extends both to the courtroom and to those critical stages of the judicial process where the assistance of counsel is needful for the protection of defendant's later rights. See *United States* v. *Wade,* 388 US 218; 87 SCt 1926; 18 LEd2d 1149 (1967). It is within this broad scope of the Sixth Amendment right to counsel that there becomes overlap with the Fifth Amendment right to counsel. The Fifth Amendment right to counsel extends to all custodial interrogation whether before or after the judicial process has reached a critical

stage. The Sixth Amendment right to counsel includes the right to the presence of counsel during "post-indictment communications between the accused and agents of the government" whether or not the defendant is in custody at the time of the interrogation. *United States* v. *Henry,* 447 US 264; 100 SCt 2183; 65 LEd2d 115 (1980).

It appears that the appropriate questions to be posed, in order to determine the validity of the Michigan Supreme Court's analogous application of *Edwards* to an assertion of Sixth Amendment right to counsel, is whether a general request for counsel in the exercise of a defendant's Sixth Amendment rights necessarily indicates a desire by the defendant to deal with the police only through counsel as in *Edwards* such that subsequent police initiated interrogation both negates the defendant's knowledge and understanding of his right to counsel and is, in effect, a request that the defendant act inconsistently with his request for counsel at arraignment. Numerous cases have dealt with these questions and many have concluded that a general request for counsel at arraignment is not such that it effectively exercises a right to preclude subsequent interrogation.

The facts of the Fifth Circuit case of *Nash* v. *Estelle,* 597 F2d 513 (Fifth Circuit 1979) are very helpful in seeing a circumstance in which a defendant clearly articulates both a desire to have counsel represent him during the judicial process and also to speak with the authorities without the presence of counsel. The following is an excerpt from an interview by an Assistant Prosecutor six days after Nash was arrested on a murder charge: (Prosecutor Files)

> Files: You want one to be appointed for you?
>
> Nash: Yes, sir.
>
> Files: OK. I had hoped that we might talk about this, but if you want a lawyer appointed, then we are going to have to stop right now.

Nash: But, uh, I kinda, you know, wanted, you know to talk about it, you know, to kinda you know, try to get it straightened out.

Files: Well, I can talk about it with you and I would like to, but if you want a lawyer, well, I am going to have to hold off, I can't talk to you. It's your life.

Nash: I would like to have a lawyer, but I'd rather talk to you.

Files: Well, what that says there is, it doesn't say that you don't ever want to have a lawyer, it says that you don't want to have a lawyer here, now. You got the right now, and I want you to know that. But if you want to have a lawyer here, well, I am not going to talk to you about it.

Nash: No, I would rather talk to you.

Files: You would rather talk to me? You do not want to have a lawyer here right now?

Nash: No, sir.

Files: You are absolutely certain of that?

Nash: Yes, sir. (Nash, *supra,* at 516-517).

The subsequent taped confession was found to be admissible on the basis that it was permissible for defendant to unburden himself by confessing to his custodians, *Nash,* at 517, while still maintaining his right to be represented during judicial proceedings. This Court's decision in *Smith* v. *Illinois,* 469 US ——, 105 SCt 490; 83 LEd2d 488 (1984) calls into question the admissibility of this statement because of the rather clear request for counsel initially made. Nonetheless, this case remains illustrative of an individual's desire to speak directly with police while maintaining the remainder of the incidents of the right to counsel.

The Fifth Circuit applied the *Nash* reasoning in a case with facts strikingly similar to those in the instant case.

In *Blasingame* v. *Estelle,* 604 F2d 893 (CA 5) (1979), Defendant Blasingame was arrested late at night and arraigned the following morning. At that arraignment, he was advised of his right to counsel and filled out a form requesting a court appointed attorney. That night, a Dallas police officer interviewed Blasingame after having advised Blasingame of his Miranda rights which Blasingame knowingly and intelligently and voluntarily waived. On appeal, Blasingame asserted that a Fifth Circuit predecessor of *Edwards* v. *Arizona* precluded questioning after his unequivocal request for counsel at arraignment. The *Blasingame* court saw the issue this way:

> In evaluating this argument, the crucial inquiry is whether defendant asserted his right to counsel in such a manner that later police inquiry 'has impinged on the exercise of the suspect's continuing option to cut off the interview.'
>
> *Nash* v. *Estelle,* 597 F2d 513, 518 (CA 5) (1979). (Blasingame at 895).

The *Blasingame* court found that the right to counsel asserted by the defendant was not one that precluded later police initiated interrogation and thus the rights asserted at arraignment were not impinged by the later inquiry. The *Blasingame* court said "Nash recognizes that some defendants may well wish to have an attorney to represent them in legal proceedings, yet wish to assist the investigation by talking to an investigating officer without an attorney present." (*Blasingame, supra,* at 895-896). After noting that the assertion of the right to counsel at arraignment was unrelated to his Fifth Amendment right to confer or have counsel present during custodial interrogation, the *Blasingame* court held that:

> Therefore, we hold that the request for an attorney at arraignment does not prevent subsequent stationhouse interrogation where the request at arraignment is not made in such a way as to effectively exercise

the right to preclude any subsequent interrogation. (*Blasingame, supra,* at 896)[1]

Nash and *Blasingame* like *Jordan, supra* and *Johnson* v. *Commonwealth, supra,* found that there was so little connection between the request for counsel at arraignment in exercise of the Sixth Amendment right to counsel and subsequent interrogation, that subsequent interrogation does not impinge on the right previously exercised. The Virginia Supreme Court in *Johnson* v. *Commonwealth, supra,* looked for guidance in this court's case of *Michigan* v. *Mosley,* 423 US 96; 96 SCt 321; 46 LEd2d 313 (1975). *Michigan* v. *Mosley,* provides far more guidance for the determination of whether the defendant's rights were violated in the instant case than does *Edwards* v. *Arizona,* due to the tremendous contrast between the *Edwards* situation and that in the instant case.

In *Michigan* v. *Mosley, supra,* the defendant was arrested on a number of robbery charges. A Detective Cowie interviewed the defendant about the robberies. During that interrogation, defendant Mosley exercised his right to remain silent, rather than his right to the presence of counsel. Two hours later, Detective Hill initiated interrogation of Mosley in reference to an unrelated homicide. The second interrogation began with advice and waiver of Miranda rights. On appeal, Mosley claimed that his assertion of the right to remain silent, made to Detective Cowie, precluded further police initiated interrogation. This court found that Mosley's rights had not been violated.

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[1] There are a number of cases which, though not without their problems in regard to the clarity of the rule therein applied, arguably involve circumstances where the request at arraignment has a close nexus to an invocation of right to the presence of counsel during interrogation. These cases are generally ones where the request for counsel follows the arraigning Magistrate's recitation of Miranda warnings. (e.g., Silva v. Estelle, 672 F2d 457 (CA 5, 1982).

The focus of this court's decision in *Mosley* was whether the defendant's " 'right to cut off questioning' was fully respected in this case." *Michigan* v. *Mosley,* 423 US 103; 96 SCt 327. The court found that the defendant's rights were fully respected. *Miranda* did not state when interrogation could be resumed after an exercise of the right to remain silent. This court refused to hold that an exercise of the right to remain silent precludes all further interrogation. Neither would this court allow reinterrogation after a momentary pause. *Mosley, supra,* 423 US 107; 96 SCt 328. Thus, *Mosley* added to Miranda the rule that the right to remain silent prevents further police initiated interrogation until there has been a significant period during which the questioning has been suspended.

Another aspect of the reasoning in *Mosley* is that the defendant's exercise of his right to remain silent made during questioning by Detective Cowie was, at the most, ambiguous as to whether Mosely was desirous of talking about any other crimes. The court noted that in these circumstances, questioning on an unrelated crime was "quite consistent with a reasonable interpretation of Mosley's earlier refusal to answer any questions about the robberies." *Mosley,* 423 US at 105; 96 SCt at 327. The advice of Miranda rights before the second interrogation gave the defendant a full and fair opportunity to once again invoke his right to remain silent. The subsequent advice of rights, though placing a minor burden on the defendant of having to once again assert his right to remain silent if that was his desire, was heavily outweighed by the beneficial value of resolving any ambiguity in the defendant's previous invocation of his right to remain silent. The facts and reasoning of *Mosley* are far more in accord with the instant case than is *Edwards* v. *Arizona.*

In the instant case, Respondent's request for counsel at arraignment does not necessarily indicate that defendant desires to only deal with police through counsel, the clear

indication by the defendant in *Edwards*. Thus, subsequent questioning by the police was "quite consistent" with Respondent's previous request for counsel. Since the individuals who interrogated Respondent did not have previous contact with Respondent, their actions of reinitiating interrogation were not inconsistent with any previous statements that they had made; thus, defendant could not reasonably believe that his rights would not, in fact, be honored. The burden placed on Respondent in the instant case is no greater than that placed on Mosley. Mosley could have protected himself from the subsequent interrogation by restating his desire to remain silent. In the instant case, defendant was readvised of Miranda rights and the interviewing detectives gave a full and fair opportunity for defendant to exercise his right to the presence of counsel. Defendant refused to do so. The great benefit in resolving the ambiguity of defendant's request for counsel at arraignment far outweighed any burden placed on defendant by requesting him to make the simple statement when advised of his Miranda rights that he does not want to talk without counsel. In the circumstances of the instant case, Respondent's Sixth Amendment rights were scrupulously honored. The waiver of his right to the presence of counsel during interrogation was knowingly, intelligently and voluntarily made. The Michigan Supreme Court erred in ruling that admission of Respondent's confession was reversible error.

The argument stated here is in accord with the reasoning of the Georgia Supreme Court in *Ross* v. *State, supra.* In *Ross,* the defendant had repeatedly spoken with police officers without requesting the presence of counsel. This is the same behavior as that of Respondent in the instant case. The Georgia Supreme Court, while recognizing that a defendant need not state preciously why he wants an attorney that if he does request an attorney, "surely from the circumstances of such a request we can find guidance

as to the accused's state of mind, which is the key voluntariness inquiry." *Ross* v. *State, supra,* 36 CL 2413. Quoting from *Collins* v. *Francis,* 728 F2d 1322, 1333-1334 (Eleventh Circuit 1984). In the circumstances of this case, it is clear that the accused's state of mind was such that he only wanted counsel to represent him during the judicial proceeding and not during custodial interrogation.

The general request for appointment of counsel in exercise of Sixth Amendment rights at arraignment is so different from the narrow and specific request for the presence of counsel during custodial interrogation under the Fifth Amendment that an analogous application of the rules of *Edwards* v. *Arizona* is totally inappropriate in this Sixth Amendment case. The Michigan Supreme Court's Sixth Amendment ruling is not required by the prior cases of this court, is contrary to the prior cases of this court and is contrary to the way that this court would decide this case were it to grant plenary review.

Even if this Court's prior cases support an analogous Sixth Amendment rule to the Fifth Amendment rule of *Edwards,* the Michigan Supreme Court's rule is not it. This Court has pursued a steady course of balancing the rights of criminal defendant's against the interests of justice over the last several years. Perhaps the most helpful aspect of this course has been the establishment of "bright line" rules to guide the conduct of police. The importance of "bright line" rules was emphasized recently in *Berkemer* v. *McCarty, supra.* In *Berkemer,* this Court ruled that Miranda rights must be given at the point of custody determined by an objective test. This rule establishes a bright line consistent with *Miranda* and *Edwards.* Common to all the "bright line" decisions of this Court is that the police officer, whose conduct is controlled by the rule, is present and able to ascertain from the events he witnesses what course of action he can take without

violating the defendant's constitutional rights. In *Edwards,* the request for counsel is made directly to police during interrogation. The request *to police* is the event that precludes further police interrogation. The rule created herein by the Michigan Supreme Court is inapposite. The request herein was made *to a judicial officer,* in circumstances where police are not necessarily present, yet the Michigan Supreme Court would have the request control *police* conduct. Such a rule obscures rather than clarifies. The police are not always privy to the facts upon which they must base their actions. This is no "bright line," it is a "black hole."

Confessions, voluntarily made, are relevant and probative evidence. This Court said in *Oregon* v. *Elstad, supra,* "voluntary statements 'remain a proper element of law enforcement.' *Miranda* v. *Arizona,* 384 U.S. at 478. 'Indeed, far from being prohibited by the constitution, admissions of guilt by wrongdoers, if not coerced, are inherently desirable. . . .' " *Oregon* v. *Elstad,* 53 Law Week at 4246. The Michigan Supreme Court's rule would result in suppression of relevant evidence where the constable has not even bungled. The rule cannot stand.

3. Necessary to the resolution of the issues raised in this Petition, is for this Court to determine whether the substance of the rights contained in standard Miranda warnings are adequate to constitute a waiver of both Sixth Amendment and Fifth Amendment rights to the presence of counsel during interrogation.

The Michigan Supreme Court has held that once the Sixth Amendment right to counsel has attached, the defendant may choose to reinitiate communication with the police, but before a confession will be admissible even where defendant has initiated a communication, the defendant must be sufficiently advised of both his Fifth and

Sixth Amendment rights so as to "effecuate a voluntary, knowing, and intelligent waiver of each right." *Bladel* at 18. The Michigan Supreme Court was not so kind as to inform police and prosecutors as to the nature of the Sixth Amendment rights waived during interrogation. The Michigan Supreme Court discussed without deciding the split of authority over whether the content of Miranda warnings are sufficient to waive the Sixth Amendment right to counsel. Petitioner submits that the content of the Miranda warnings are adequate to provide a basis for knowing, intelligent and voluntary waiver of the Sixth Amendment right to the presence of counsel at post-arraignment interrogation.

As noted above, the Miranda right to the presence of counsel during custodial interrogation is a means of protecting the defendant in the exercise of his Fifth Amendment rights. This court has noted in *Berkemer* v. *McCarty,* —— US ——, 104 SCt 3138, 3150, note 27, 82 LEd2d 317 (1984) that one of the purposes of the Miranda rule is to protect the defendant from confessions elicited through trickery. The pre-trial Sixth Amendment right to counsel is intended to preserve the defendant's "basic right to a fair trial as affected by his right meaningfully to cross-examine the witnesses against him and to have effective assistance of counsel at the trial itself." *United States* v. *Wade, supra,* 388 US at 227; 87 SCt at 1932. It would appear that the Fifth and Sixth Amendment rights in this narrow area of overlap are identical. Both extend the right to counsel for the purpose of protecting in all ways the rights of the criminal defendant as they arise in the context of custodial interrogation. More specifically, the Fifth Amendment right, as articulated in *Miranda,* is the right to the presence of counsel during custodial interrogation. The Sixth Amendment right, as articulated in *United States* v. *Henry, supra,* 447 US at 269; 100 SCt at 2186, is the right to have counsel present during post-indictment

communications. In the instant case, the post-arraignment communications were in the context of custodial interrogation. Being post-arraignment, there is no doubt in the Defendant's mind that he has been charged with a crime and what that crime is. His only right under either the Fifth or Sixth Amendment is to the presence of counsel. The Miranda warnings so advised Respondent. In the instant case, Respondent was informed of the full scope of his rights in regard to counsel during these communications which right is to the presence of counsel. Respondent specifically waived that right and therefore in the context of the instant case, Miranda warnings clearly suffice for a knowing, intelligent and voluntary waiver of both Respondent's Fifth and Sixth Amendment rights to counsel.

The argument above is in accord with the case of *United States* v. *Karr,* 742 F2d 493, (Ninth Circuit 1984). The *Karr* court noted that the Sixth Amendment right to counsel is analytically distinct from the Fifth Amendment right to counsel. *Karr* at 495. However, after reviewing a number of cases on this point, the court concluded that Miranda warnings were sufficient to constitute a waiver of Sixth Amendment rights to counsel. *Karr* at 496. In *Karr,* the defendant was aware that formal judicial proceedings had begun, was given Miranda warnings and waived those before confessing. The court concluded that this was a valid waiver of the defendant's Sixth Amendment rights.

Petitioner requests that this Court address this issue and decide in Petitioner's favor so that a full resolution of this case may be had without the necessity of a return to this Court for clarification of this question.

CONCLUSION

There is a tremendous conflict both in State and Federal courts regarding the effect of this Court's rule in *Edwards* v. *Arizona* in the Sixth Amendment context. This conflict includes both questions as to whether police initiated interrogation can properly follow a request for counsel at arraignment and whether standard Miranda warnings would suffice as a basis for a knowing, intelligent and voluntary waiver of Sixth Amendment rights. In addressing the first of these issues, the Michigan Supreme Court ignored the reasoning of *Edwards* and directly applied the *Edwards* result in an analytically distinct case. This Court would most likely decide the issues presented differently than they were decided by the Michigan Supreme Court. In light of the errors by the Michigan Supreme Court and the conflict which can only be resolved by this Court, Petitioner respectfully prays that this Court will issue a Writ of Certiorari to the Michigan Supreme Court in the instant case.

Respectfully submitted,

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Counsel for Petitioner

Dated: March 29, 1985

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was served upon Ronald J. Bretz, Assistant Defender, State Appellate Defender's Office, 720 Plaza Center, 125 W. Michigan Avenue, Lansing, Michigan 48193 and Rudy Bladel, #158760, Marquette Branch Prison, P.O. Box 779, Marquette, Michigan 49855 by an agent of Byron S. Adams, by depositing same in the United States mail this ____ day of March, 1985 postage prepaid.

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APPENDICES

APPENDIX A

SUPREME COURT OPINION

SUPREME COURT
Lansing, Michigan
48909

January 29, 1985

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Re: People v Bladel, No. 69749
People v Jackson, No. 69615

To All Attorneys of Record:

Due to editorial work necessary to prepare the enclosed opinion for release, release on the date of decision was not possible. Therefore, by direction of the Court, this is to advise you that, notwithstanding the provisions of GCR 1963, 864.4, the 20-day period for moving for rehearing commences on the date the opinion is released to the parties. In this case, that date is January 29, 1985.

Very truly yours,

SUPREME COURT CLERK

CRD/kle
Enclosure

7-8/April 1984

STATE OF MICHIGAN
SUPREME COURT

Released January 29, 1985

No. 69749

PEOPLE OF THE STATE OF MICHIGAN, *Plaintiff-Appellant,*

v

RUDY BLADEL, *Defendant-Appellee.*

No. 69615

PEOPLE OF THE STATE OF MICHIGAN, *Plaintiff-Appellee,*

v

ROBERT BERNARD JACKSON, *Defendant-Appellant.*

[Filed Dec 28 1984]

BEFORE THE ENTIRE BENCH

M. F. CAVANAGH, J.

The common issue presented in these appeals is whether statements obtained after a defendant has requested appointment of counsel at arraignment are admissible pursuant to the principles enunciated in *Edwards* v *Arizona,* 451 US 477; 101 S Ct 1880; 68 L Ed 2d 378 (1981), and *People* v *Paintman,* 412 Mich 518; 315 NW2d 418 (1982), *cert den* 456 US 995; 102 S Ct 2280; 73 L Ed 2d 1292 (1982).

I

A

Defendant Bladel was convicted by a jury in July, 1979, of three counts of first-degree premeditated murder.[1] He

[1] MCL 750.316; MSA 28.548.

was sentenced to three concurrent mandatory life sentences. Testimony at trial revealed that three railroad employees were shot to death on December 31, 1978, at the Amtrak station in Jackson, Michigan. Defendant, a disgruntled former railroad employee, was the prime suspect.[2] He was arrested on January 1, 1979, and questioned twice by Detective Gerald Rand on January 1 and 2. Defendant was properly advised of his *Miranda*[3] rights before each questioning and agreed both times to talk without an attorney. Defendant admitted being in and around the station on December 30 and 31, 1978, but denied any involvement in the killings. He was released on January 3.

On March 18, 1979, the shotgun used in the killings was found. The weapon had been purchased by defendant two

[2] The evidence against defendant was substantial. Shortly before he died, one of the victims indicated that the assailant was a white male. A ticket clerk observed a tall, husky person walking away from the station after the shootings, carrying a soft-sided suitcase. A passerby similarly testified that he observed a stocky man wearing a jacket and cap walking away from the station carrying a case. He entered a nearby hotel. Defendant had rented a room at that hotel on December 30 and 31, 1978.

When defendant was arrested on January 1, 1979, he was wearing a blue nylon jacket and cap and was carrying a brown soft-sided suitcase, which contained a can of gun oil. Defendant first claimed that he had been nowhere near the station, but later stated that he had used the restrooms there twice. He claimed to have recently arrived in Jackson to look for a job, even though it was a holiday weekend.

A 12-gauge shotgun and duck jacket were found in mid-March 1979. Ballistics evidence disclosed that a spent shotgun shell found at the scene of the killings came from the shotgun. The weapon had been purchased by defendant in Elkhart, Indiana, two years before the killings. Fibers found on the gun and the duck jacket and in defendant's suitcase were identical. A speck of human blood was also found on the cap defendant was wearing when he was first arrested.

[3] *Miranda* v *Arizona,* 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

7-8/April 1984

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SUPREME COURT

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[3] *Miranda* v *Arizona,* 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

years before the killings. The police also obtained strong scientific evidence linking him to the killings. Defendant was arrested in Elkhart, Indiana, on March 22, 1979. He waived extradition after being advised by a magistrate of his right to a full hearing and representation by counsel.

Defendant was driven back to Jackson the same afternoon. Detective Rand questioned him again that evening. Prior to questioning, defendant was properly advised of his rights, agreed to talk without counsel, and signed a waiver form. He did not confess to the killings.

Defendant was arraigned on Friday, March 23, 1979, in the presence of Detective Rand. Defendant requested that counsel be appointed for him because he was indigent. A notice of appointment was mailed to a law firm that day, but was not received until Tuesday, March 27, 1979. Defendant was not informed during the interim that counsel had been appointed, although he inquired several times.

On March 26, 1979, two police officers interviewed defendant in the county jail. Although the officers were working with Detective Rand on this case, they were not told that defendant had requested counsel. Prior to questioning, the defendant was again properly advised of his *Miranda* rights. When he informed the officers that he had requested counsel, they inquired whether he wished to have an attorney present during questioning. Defendant agreed to proceed without counsel, signed a waiver form, and subsequently confessed to the killings.

Defendant challenged the admissibility of the confession and the three exculpatory statements at a pretrial *Walker*[4] hearing. The trial court ruled that all of the statements were admissible because defendant was properly advised

[4] *People* v *Walker* (*On Rehearing*), 374 Mich 331; 132 NW2d 87 (1965).

of his rights and had knowingly and understandingly waived them each time.[5]

On appeal, defendant challenged only the admissibility of the confession. The Court of Appeals upheld the trial court's decision and affirmed the convictions.[6] *People* v *Bladel*, 106 Mich App 397; 308 NW2d 230 (1981). In lieu of granting leave to appeal, this Court remanded to the Court of Appeals for reconsideration in light of *People* v *Paintman* and *People* v *Conklin*, 412 Mich 518; 315 NW2d 418 (1982). On remand, the Court of Appeals summarily concluded that *Paintman* and *Conklin*, when read in conjunction with this Court's remand order, "compelled" reversal. 118 Mich App 498; 325 NW2d 421 (1982). We granted the prosecutor's application for leave to appeal. 417 Mich 885; 330 NW2d 846 (1983).

B

Defendant Jackson was charged with first-degree murder, conspiracy to commit first-degree murder,[7] and pos-

[5] The court acknowledged that the lack of opportunity to consult with counsel before interrogation does affect the voluntariness and effectiveness of a waiver. However, it knew of no case which required suppression under these circumstances.

[6] The Court of Appeals rejected defendant's assertion that interrogation can never occur once a defendant requests counsel. The court acknowledged that the prosecutor bore a heavy burden in proving a knowledgeable and voluntary waiver and that the police may have acted unethically in obtaining the confession. Nevertheless, the waiver was valid because defendant had been warned by the Indiana magistrate not to talk to police until he met with counsel, he had prior contact with the criminal justice system and understood his rights, he had signed a waiver form, and had not reasserted his right to counsel during the interrogation. Finally, the four-day delay between arraignment and the first meeting with counsel was not unreasonable. There was no evidence that defendant was kept from his attorney in order to obtain a confession.

[7] MCL 750.157a; MSA 28.354(1) and MCL 750.316; MSA 28.548.

session of a firearm during the commission of a felony[8] in connection with the death of Rothbe Elwood Perry. He was convicted by a jury in February, 1980, of second-degree murder[9] and conspiracy to commit second-degree murder. He was sentenced to two concurrent life terms.

Mr. Perry was shot and killed in his home in Livonia, Michigan, on July 12, 1979, during an apparent robbery. On July 28, 1979, Mildred Perry (the deceased's wife) and Charles (Chare) Knight were arrested for the murder. Knight subsequently told Livonia police that Mildred Perry had solicited him to kill her husband. He, in turn, had contacted defendant. Knight maintained that defendant and another man had broken into the house and shot the deceased.

Defendant and Michael White were arrested on Monday, July 30, 1979, by Detroit police on an unrelated charge. They were turned over to the Livonia police at approximately 2 p.m. the following day. Defendant was questioned several times on July 31 and gave three similar statements.[10] Defendant admitted breaking into the house to

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[8] MCL 750.227b; MSA 28.424(2).

[9] MCL 750.317; MSA 28.549.

[10] Defendant's first oral statement was given at 3.30 p.m. A similar statement was tape recorded at 5:52 p.m., but was retaped at 8:48 p.m. because of the poor quality of the prior recording. Defendant maintained that he was not advised of his *Miranda* rights until shortly before the first taping and that he had requested an attorney during the first interrogation. He agreed to confess because the police suggested that he might be able to plead to less than first-degree murder. He was also afraid that he would be beaten.

In contrast, several police officers testified that defendant was advised of his rights as he was being transported from Detroit to Livonia and before each statement was given. They denied that defendant had ever requested an attorney. They also denied promising him a "deal" or threatening him. The trial court found the police officers' testimony to be more credible.

kill Mr. Perry, but maintained that Knight had fired the shots.

On August 1, at approximately 10 a.m., defendant submitted to a polygraph examination after being advised of his *Miranda* rights. When defendant was informed that he had not passed, he told the examiner that he was the shooter and White had accompanied him. Defendant gave substantially similar oral and written statements shortly thereafter to Sergeant William Hoff, one of the officers in charge of the case.[11]

Defendant, White, Perry, and Knight were arraigned at 4:30 p.m. that afternoon. During arraignment, defendant requested that counsel be appointed for him. Sergeants Hoff and Shirley Garrison were present when defendant requested counsel.

At 10:24 a.m. the next morning, defendant was readvised of his rights by Sergeants Garrison and Hoff and agreed to give another tape-recorded statement to "confirm" that he was the shooter. Defendant had not yet had an opportunity to consult with counsel. When asked whether he had been promised anything for his statement, defendant replied that nothing had been actually guaranteed, but something would be worked out.

Prior to trial, a lengthy *Walker* hearing was conducted. The trial court ruled that all of defendant's statements were admissible because he had been advised of his *Miranda* rights before each statement was given, he never requested an attorney during the interrogations, he knowingly and voluntarily waived his rights each time, no improper promises or threats were made by the police, and

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[11] Subsequent to these statements, the police reinterrogated Michael White, who had repeatedly denied any involvement. Defendant was brought into the interrogation room to persuade White to confess. This interrogation session was tape recorded. White subsequently confessed to the murder after arraignment.

the statements were not the result of any illegal delay in arraignment.[12]

In affirming defendant's conviction for second-degree murder,[13] the Court of Appeals upheld the trial court's findings of fact. As to the post-arraignment statement, the court noted that the original panel in *Bladel* had found a knowledgeable and voluntary waiver of the right to counsel on almost identical facts. *Edwards* and *Paintman* were distinguished on the grounds that defendant asked for an attorney at arraignment, rather than during police interrogation. This request was "not made in such a way as to effectively exercise the right to preclude any subsequent interrogation" and was unrelated to defendant's Fifth Amendment right to counsel. 114 Mich App 649, 658-659; 319 NW2d 613 (1982). We granted defendant's application for leave to appeal. 417 Mich 885; 330 NW2d 846 (1983).

II

Defendants argue that their post-arraignment statements were obtained in violation of their Fifth and Sixth Amendment rights to counsel because they asked the arraigning magistrate for appointed counsel. To determine whether these statements are admissible, the following questions must first be resolved:

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[12] However, White's confession was suppressed as being coerced. Primarily on the basis of the recorded interrogation of August 1, the trial court found that the police had ignored White's requests for counsel and improperly offered plea bargains.

[13] The Court of Appeals vacated defendant's conviction and sentence for conspiracy to commit second-degree murder because the crime could not logically exist. The court reasoned that defendant could not have conspired to commit a criminal act which by definition is committed without premeditation and deliberatioon. The prosecutor has not challenged this ruling on appeal to this Court.

1) What constitutional right(s) to counsel attached at the post-arraignment interrogations?

2) What right(s) to counsel did defendants invoke when they requested counsel at arraignment?

3) What right(s) to counsel did defendants purportedly waive prior to their post-arraignment interrogations?

A

The right to counsel is guaranteed by both the Fifth and Sixth Amendments to the United States Constitution, as well as Const 1963, art 1, §§ 17 and 20.[14] However, these constitutional rights are distinct and not necessarily coextensive. See *Rhode Island* v *Innis,* 446 US 291, 300, fn 4; 100 S Ct 1682; 64 L Ed 2d 297 (1980).

In *Miranda,* the United States Supreme Court declared that an accused has a Fifth and Fourteenth Amendment right to have counsel present during custodial interrogation in order to protect the accused's Fifth Amendment privilege against compulsory self-incrimination. *Innis, supra,* p. 297; *Edwards, supra,* 451 US 481. However, the Fifth Amendment right to counsel attaches only when an accused is in custody, *United States* v *Henry,* 447 US 264, 273, fn 11; 100 S Ct 2183; 65 L Ed 2d 115 (1980), and subjected to interrogation. *Innis, supra,* p 298; *Kirby* v *Illinois,* 406 US 682, 688; 92 S Ct 1877; 32 L Ed 2d 411 (1972). Once an accused invokes his right to have counsel present during custodial interrogation, the police must

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[14] Const 1963, art 1, § 17 provides in relevant part:

> "No person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law."

Const 1963, art 1, § 20 provides in relevant part:

> "In every criminal prosecution, the accused shall have the right . . . to have the assistance of counsel for his defense . . . ."

refrain from further interrogation until counsel is made available, unless the accused initiates further communications, exchanges, or conversations with the police. *Edwards, supra,* pp 484-485; *Paintman, supra,* 412 Mich 526. Neither *Miranda* nor its progeny limits the Fifth Amendment right to counsel to custodial interrogations conducted prior to arraignment. Since defendants were clearly subjected to custodial interrogation when they made their post-arraignment confessions, their Fifth Amendment right to counsel had attached.

The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." However, this right to counsel attaches only at or after the initiation of adversary judicial proceedings against the accused by way of a formal charge, preliminary hearing, indictment, information, or arraignment. *United States* v *Gouveia,* —— US ——, ——; 104 S Ct 2292; 81 L Ed 2d 146, 153-154 (1984); *Kirby, supra,* 406 US 688-689. The accused is entitled to counsel not only at trial, but at all "critical stages" of the prosecution, *i.e.,* those stages "where counsel's absence might derogate from the accused's right to a fair trial." *United States* v *Wade,* 388 US 218, 226-227; 87 S Ct 1926; 18 L Ed 2d 1149 (1967). Regardless of whether the accused is in custody or subjected to formal interrogation, the Sixth Amendment right to counsel exists whenever the police attempt to elicit incriminating statements. *Henry, supra,* 447 US 271-273. See also *Brewer* v *Williams,* 430 US 387; 97 S Ct 1232; 51 L Ed 2d 424 (1977); *Massiah* v *United States,* 377 US 201; 84 S Ct 1199; 12 L Ed 2d 246 (1964). This right to counsel does not depend upon a request by the accused and courts indulge in every reasonable presumption against waiver. *Brewer, supra,* pp 404-405. Since defendants were interrogated subsequent to arraignment, they were also entitled to counsel under the Sixth Amendment.

B

The foregoing analysis demonstrates that defendants' request to the arraigning magistrate for appointment of counsel implicated only their Sixth Amendment right to counsel. Although defendants were in custody at the time of their arraignments, they were not subjected to interrogation. In addition, they did not specifically request counsel for any subsequent custodial interrogations which might be conducted. Defendants requested appointed counsel because they were financially incapable of retaining an attorney and were unwilling to represent themselves. See *State* v *Sparklin,* 296 Or 85; 672 P2d 1182, 1185-1186 (1983).

C

The trial courts found that defendants never invoked their Fifth Amendment right to counsel before or during their post-arraignment interrogations. Furthermore, defendants knowingly and voluntarily waived their *Miranda* rights prior to their statements. Our independent review of the record does not disclose that these findings are clearly erroneous. *People* v *McGillen #1,* 392 Mich 251, 257; 220 NW2d 677 (1974); *People* v *Robinson,* 386 Mich 551, 557; 194 NW2d 709 (1972).

III

The question remains whether defendants' waiver of their Fifth Amendment right to counsel also waived their Sixth Amendment right to counsel. Defendants were given standard *Miranda* warnings prior to their post-arraignment interrogations. However, these warnings were designed to advise an accused only of his Fifth Amendment rights. The Sixth Amendment right to counsel is considerably broader than its Fifth Amendment counterpart since it applies to all critical stages of the prosecution. Neither the United States Supreme Court nor this Court has de-

lineated specific procedural requirements for waiver of the Sixth Amendment right to counsel.[15]

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[15] Although *Edwards* arguably involved a statement obtained after judicial criminal proceedings had commenced, the Supreme Court specifically declined to address the Sixth Amendment question because the state court had no done so. *Edwards, supra,* 451 US 480, fn. 7. Similarly, in *Conklin* (the companion case to *Paintman*), a confession was obtained seven days after the defendant requested counsel during his arraignment. See *Paintman, supra,* 412 Mich 526. This Court did not discuss the Sixth Amendment ramifications of this request since Paintman and Conklin had also invoked their Fifth Amendment right to counsel prior to arraignment.

Numerous courts have attempted to define what procedural requirements are sufficient to ensure that a defendant's waiver of his Sixth Amendment right to counsel is voluntary, knowing and intelligent. See cases cited in *People* v. *Green,* (Levin, J., *dissenting*), 405 Mich. 273, 302-304, and fns. 5-8; 274 NW2d 448 (1979), and Note, *Proposed Requirements for Waiver of the Sixth Amendment Right to Counsel,* 82 Colum L R 363, 369, fn 42 (1982). Some courts have held that a valid waiver of *Miranda* rights alone is sufficient, while other courts require that the defendant be specifically informed of his Sixth Amendment rights by the police or a neutral magistrate. Some cases apparently have turned on the particular facts presented, *e.g.,* whether the defendant or the police initiated the conversation which resulted in the confession, or whether the police were aware that defendant had been arraigned, had requested counsel, or had obtained counsel by the time the interrogation was conducted. *Id.*

Recent law review articles generally advocate that higher standards be implemented to safeguard the Sixth Amendment right to counsel. See, *e.g.,* 82 Colum L R, *supra,* p 381 (defense counsel should be present when defendant waives his right to counsel); Note, *Sixth Amendment Right to Counsel: Standards for Knowing and Intelligent Pretrial Waivers,* 60 Boston U L R 738, 762-764 (1980) (in addition to *Miranda* warnings, defendant must be told that he has been formally charged, the significance thereof, and how an attorney could assist him); Grano, *Rhode Island* v *Innis: A Need to Reconsider the Constitutional Premises Underlying the Law of Confessions,* 17 Am Crim L R 1, 35 (1979) (police cannot elicit information from defendant unless they seek to notify counsel; if on attorney exists, defendant's waiver must meet the standards that govern waiver of the right to counsel at trial pursuant to *Faretta* v *California,* 422 US 806; 96 S Ct 2525; 45 L Ed 2d 562 [1975]); *cf. Constitutional Law—Right to Counsel,* 49 Geo Washington L R 399, 409-410 (1981)

A

Courts which have specifically addressed the problem of requests for counsel at arraignment have reached differing results both before and after *Edwards* was decided. The Second Circuit Court of Appeals has adopted the strictest procedural requirements for waiver of the Sixth Amendment right to counsel. In *United States* v *Satterfield,* 558 F2d 655, 657 (CA 2, 1976), defendant's post-indictment and post-arraignment statements were suppressed, even though he had executed a written waiver of his *Miranda* rights. The Court reasoned that even if the statements were voluntary for purposes of the Fifth Amendment "they were involuntary with 'regard . . . [to] the higher standard with respect to waiver of the right to counsel that applies when the Sixth Amendment has attached.' "

Specific procedural safeguards were adopted in *United States* v *Mohabir,* 624 F2d 1140 (CA 2, 1980).[16] The *Mohabir* Court explained that a higher standard for waiver of counsel is required after judicial proceedings have commenced because the government has committed itself to prosecute, and any questioning by the government can only be for the purpose of buttressing its prima facie case.

(*Miranda* warnings sufficient unless defendant indicted before arrest). United States Supreme Court Justice Thurgood Marshall has also consistently advocated a higher standard for waiver of the Sixth Amendment right to counsel. See *Wyrick* v *Fields* (Marshall, J., *dissenting*), 459 US 42, 54-55; 103 S Ct 394; 74 L Ed 2d 214 (1982), *cert den after remand* —— US ——; 104 S Ct 556; 78 L Ed 2d 728 (1983).

[16] *Mohabir* involved an indirect request for counsel to the arraigning magistrate. Before interrogation, defendant was advised several times of his *Miranda* rights, the nature of the charegs against him, and the fact that he had been indicted. He was also given a copy of the indictment, but was not informed of the significance thereof. During interrogation, defendant was asked if he would need counsel appointed for arraignment. He replied affirmatively, but questioning continued. The arraigning magistrate was informed of defendant's request and contacted an attorney to represent defendant.

Informing a defendant of his *Miranda* rights and the fact that he has been indicted is insufficient, since this information may not allow the accused to " 'appreciate the gravity of his legal position, and, the urgency of his need for a lawyer's assistance.' " *Id.*, pp 1148-1150. In the exercise of its supervisory power, the *Mohabir* Court held that an accused may not validly waive his Sixth Amendment right to counsel unless a federal judicial officer has explained the content and significance of this right.[17] Furthermore, the accused must be shown the indictment and informed of its significance, the right to counsel, and the seriousness of his situation should he decide to answer further police questions without counsel. The Court believed that this procedure would minimize disputes as to what warnings were actually given and whether defendant fully comprehended his rights. *Id.*, p 1153.

The Fifth Circuit, on the other hand, has reached conflicting results, primarily because it has not adequately distinguished the Fifth and Sixth Amendment rights to counsel. In *Blasingame* v *Estelle*, 604 F2d 893, 895-896 (CA 5, 1979), the Court stated that the crucial inquiry is whether defendant's assertion of his right to counsel before the arraigning magistrate was made in such a manner that the subsequent police questioning "impinged on the exercise of the suspect's continuing option to cut off the interview." It was noted that some defendants may wish to have an attorney represent them in legal proceedings, yet wish to assist the police by responding to questions without an attorney being present. The Court found that Blasingame's request was not an invocation of his Fifth

[17] The *Mohabir* Court refused to allow the prosecutor to give this advice since he is an adversary of the defendant. It postponed consideration of a third alternative, *i.e.*, "outlawing" all statements made by an indicted defendant following an uncounseled waiver. The Court noted that such an approach could conflict with the defendant's constitutional right to represent himself under *Faretta* v *California*, *supra*. *Mohabir*, *supra*, 624 F2d 1151-1153.

Amendment right to confer with or have counsel present during questioning. Since he was informed of his *Miranda* rights at arraignment and before his subsequent interrogation, and had voluntarily and intelligently waived these rights, his post-arraignment statements were admissible.[18] *Blasingame*, however, was decided solely on Fifth Amendment grounds.

A contrary result was reached in *Silva* v *Estelle*, 672 F2d 457 (CA 5, 1982). There, defendant was questioned one hour after he asked the arraigning magistrate for permission to call his attorney. This request was construed as an unequivocal exercise of defendant's right to counsel. The *Silva* Court concluded that under *Edwards*, the police were not entitled to initiate further interrogation unless they first honored defendant's request for counsel. Like *Blasingame*, *Silva* did not distinguish between defendant's Fifth and Sixth Amendment rights to counsel.

Shortly after *Silva* was decided, *Jordan* v *Watkins*, 681 F2d 1067, 1073-1075 (CA 5, 1982), held that the police, who were not aware that counsel had been appointed at arraignment, properly interrogated the defendant. *Edwards* was distinguished on the grounds that Jordan had never requested counsel with respect to custodial interrogation or attempted to cut off questioning; he merely wanted counsel to assist him in further judicial proceedings. (The *Jordan* Court relied heavily upon *Blasingame* in reaching this conclusion, but did not mention *Silva*.) After examining the totality of the circumstances, the Court found that Jordan had voluntarily, knowingly, and intelligently waived both his Fifth and Sixth Amendment rights to counsel.

In contrast, the Sixth Circuit held, in *United States* v *Campbell*, 721 F2d 578, 579 (CA 6, 1983), that incriminat-

[18] The Court of Appeals relied primarily on *Blasingame* in concluding that Bladel and Jackson's post-arraignment statements were admissible.

ing statements obtained thirteen minutes after defendant requested and was appointed counsel were inadmissible. The Court noted that the interrogating agents had manifested an indifference to, if not an intentional disregard for, defendant's Sixth Amendment right to counsel and Fifth Amendment right against compulsory self-incrimination, primarily because they were present when defendant requested counsel. The agents improperly conducted "one last round of interrogation" before defendant had an opportunity to consult with counsel. Such conduct clearly violated *Edwards*. *Jordan* was distinguished because Campbell had not voluntarily, knowingly, and intelligently waived his Fifth Amendment right to counsel by initiating the post-arraignment conversation.

Several state supreme courts have addressed this problem, but have also reached conflicting results. In *Johnson* v *Commonwealth*, 220 Va 146, 158-159; 255 SE2d 525 (1979), *later app* 221 Va 736; 273 SE2d 784 (1981), *cert den* 454 US 920; 102 S Ct 422; 70 L Ed 2d 231 (1981), the police initiated interrogation five hours after defendant requested counsel at arraignment. The Virginia Supreme Court held that defendant's confession was admissible because he had knowingly, intelligently, and voluntarily waived his right to counsel prior to interrogation. The Court found that the police officers' conduct was not coercive, they were not aware that defendant had been arraigned, and defendant had never requested counsel during the interrogation. However, the *Johnson* Court did not distinguish between defendant's Fifth and Sixth Amendment rights to counsel. Furthermore, the case was decided prior to *Edwards*.

The United States Supreme Court ultimately denied defendant's petition for certiorari, over a lengthy dissent written by Justice Marshall. He believed that the decision to admit the confession was contrary to the spirit, if not the letter, of *Edwards*. He rejected the state's attempt to distinguish *Edwards*:

"The State attempts to distinguish *Edwards* on two grounds. First, it points out that Edwards clearly expressed his desire to deal with police only through counsel, whereas petitioner here simply asked that an attorney be appointed. However, an accused is under no obligation to state precisely why he wants a lawyer. If we were to distinguish cases based on the wording of an accused's request, the value of the right to counsel would be substantially diminished. As we stated in *Fare* v *Michael C.*, 442 US 707, 719 [99 S Ct 2560; 61 L Ed 2d 197] (1979), 'an accused's request for an attorney is per se an invocation of his Fifth Amendment rights, requiring that all interrogation cease.'

"Second, the State notes that Edwards informed the police of his desire for an attorney, whereas petitioner only informed the judge at his arraignment. The State suggests that since the police did not know about petitioner's request, the interrogation was not improper. However, the police could easily have determined whether petitioner had already exercised his right to counsel; presumably, a prosecutor was present at the arraignment. They did not know about petitioner's request for a lawyer only because they made no effort to determine whether such a request had been made. But even if the police could not have discovered that petitioner had expressed a desire for an attorney, I would hold that the confession should not have been admitted. The key question in this case is whether petitioner's waiver of his right to counsel was knowing, intelligent, and voluntary. In determining whether these conditions were satisfied, the fact that the police were unaware of a prior request for counsel is only tangentially relevant. What is important, rather, is the state of mind of the accused. I think it is no more safe to assume that a waiver is valid when an accused has made a prior request to the judge at his arraign-

ment than when he has made the request to police. In both cases, the accused informs an individual in authority that he would like an attorney—and yet shortly thereafter, state officials, apparently disregarding his request, ask him to waive his rights." 454 US 922-923.

In *State* v *Sparklin*, 296 Or 85; 672 P2d 1182 (1983), the Oregon Supreme Court carefully differentiated between the two constitutional rights to counsel. There, defendant requested an attorney at his arraignment on a forgery charge stemming from the use of a stolen credit card. That evening, the police interrogated him concerning an assault on the credit card owner and a factually unrelated murder and robbery. Defendant waived his *Miranda* rights and confessed to the murder.

The *Sparklin* Court initially found that defendant had not invoked either his state or Fifth Amendment right to counsel or privilege against compulsory self-incrimination during arraignment. Unlike an interrogation session, a defendant is not confronted with an atmosphere of coercion or attempts to gain admissions during arraignment. Without a more explicit request or one made in anticipation of, or during interrogation, defendant's request for an attorney was deemed to be merely "a matter of routine." *Id.*, pp 1185-1186.

Turning to the Sixth Amendment right to counsel and its state counterpart, the *Sparklin* Court noted that pursuant to its earlier interpretations of the Oregon Constitution, the state was required to notify the defendant's attorney prior to interrogation and afford him an opportunity to be present. Furthermore, the defendant could not waive his state constitutional right to counsel until he had consulted with his attorney, although he could volunteer statements on his own initiative. *Id.*, p 1187. Although the comparable Sixth Amendment right to counsel was not so clearly defined, the court believed that it was of equal

scope. *Id.*, p 1188. In dicta, the Court noted that if defendant had been questioned for the crimes against the credit card owner, the interrogation would have been improper since no waiver could have been given before counsel was consulted. *Id.*, p 1190.[19]

The most recent decision is *State* v *Wyer*, 320 SE2d 92 (W Va, 1984). After reviewing numerous cases, the West Virginia Supreme Court concluded that there is no rule per se against waiver of the Sixth Amendment right to counsel. However, it believed that such a waiver should be judged by stricter standards than a waiver of the Fifth Amendment right to counsel. The *Wyer* Court refused to equate a general request for counsel at arraignment with an *Edwards* direct request for counsel to an interrogating officer, since the Sixth Amendment right attaches regardless of whether a specific request is made. Thus, the police could initiate questioning after a defendant requests counsel at arraignment, as long as the defendant is willing to waive his Sixth Amendment right.

In order to ensure a valid waiver of the Sixth Amendment right to counsel, the *Wyer* Court held that a defendant must execute a written waiver after being informed of his arrest, the nature of the charges against him, and his *Miranda* rights. If the defendant asserts his *Edwards* right to counsel when the waiver is sought, interrogation must cease until counsel is made available, unless the defendant initiates further communications with the intent to waive his Sixth Amendment right to counsel. The interrogating officer's knowledge that counsel has been requested was deemed to be only "one ingredient" in determining whether the waiver was valid, rather than an absolute bar. *Id.*, p 105 and fns 23 & 25.

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[19] However, since the interrogation related to a criminal episode unrelated to the one on which defendant was arraigned and for which counsel was obtained, the *Sparklin* Court concluded that the confession was properly obtained. 672 P2d 1188.

The *Wyer* dissent persuasively argued that if a *Miranda* waiver is inadequate to protect the Fifth Amendment right to counsel under *Edwards,* it certainly would be inadequate to protect the greater Sixth Amendment right. The dissent believed that once a defendant makes an oral or written request for counsel to the magistrate, the police must notify his lawyer and refrain from further interrogation until the defendant has spoken to him. If, after consultation, the defendant wishes to forego his right to counsel, he can then do so. The officer's presence at arraignment was deemed an irrelevant consideration, since both he and the prosecutor have a duty to discover whether the defendant has been arraigned and if he requested counsel. Such safeguards would not prevent confessions, but only guarantee that they were voluntary and obtained without violating the defendant's right to counsel. The dissent concluded:

> "[I]t is time to recognize that all defendants without counsel are constitutionally disadvantaged when faced with a government armory of armed police, prosecutors and professional interrogators." *Id.*, p 111.

B

As the foregoing discussion demonstrates, no consistent approach to the waiver problem has emerged. However, it is clear that no court has adopted a per se rule which prevents a defendant from ever waiving his Sixth Amendment right to counsel.[20] We also decline to adopt such a rule.

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[20] Although the United States Supreme Court sidestepped this issue in *Brewer, supra,* 430 US 405-406, it suggested that a Sixth Amendment waiver was not precluded in *Estelle* v *Smith,* 451 US 454, 471, fn 16; 101 S Ct 1866; 68 L Ed 2d 359 (1981). Moreover, the Supreme Court has stated that the Sixth Amendment right to counsel may be waived at a post-indictment lineup. *Wade, supra,* 388 US 237. In addition, a defendant has a constitutional right to waive the assistance of counsel at trial, as long as the trial court advises the defendant of the dangers and disadvantages of self-representation and the defendant knowingly and voluntarily waives his right to counsle. *Faretta, supra,* 422 US 835; *People* v *Anderson,* 398 Mich 361, 368; 247 NW2d 857 (1976).

It is also clear that if defendants had invoked their Fifth Amendment right to counsel to the police, *Edwards* and *Paintman* would have barred all further interrogation until defendants had an opportunity to consult with counsel, since they did not reinitiate further conversations with the police. The United States Supreme Court adopted this prophylactic rule to protect an accused from being badgered by the police while in custody. *Oregon* v *Bradshaw,* 462 US 1039, ——; 103 S Ct 2830; 77 L Ed 2d 405, 411 (1983).

Although judges and lawyers may understand and appreciate the subtle distinctions between the Fifth and Sixth Amendment rights to counsel, the average person does not. When an accused requests an attorney, either before a police officer or a magistrate, he does not know which constitutional right he is invoking; he therefore should not be expected to articulate exactly why or for what purposes he is seeking counsel. It makes little sense to afford relief from further interrogation to a defendant who asks a police officer for an attorney, but permit further interrogation of a defendant who makes an identical request to a judge. The simple fact that defendant has requested an attorney indicates that he does not believe that he is sufficiently capable of dealing with his adversaries singlehandedly. As Justice Marshall noted, if we are to distinguish cases solely on the wording of an accused's request and to whom it is made, the value of the right to counsel would be substantially diminished.

Furthermore, once adversary judicial proceedings have commenced, the police have "everything to gain" and the accused "everything to lose" when "one last round" of interrogation is conducted before counsel arrives:

> "As Justice Stewart noted in *Kirby* v *Illinois, supra,* 406 US at 689-690:
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> "'The initiation of judicial criminal proceedings is far from a mere formalism. It is the starting point of

our whole system of adversary criminal justice. For it is only then that the government has committed itself to prosecute, and only then that the adverse positions of government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law. It is this point, therefore, that marks the commencement of the "criminal prosecutions" to which alone the explicit guarantees of the Sixth Amendment are applicable.' • • •

"The indictment thus marks a crucial point for the defendant; it also marks the point after which any questioning of the defendant by the government can only be 'for the purpose of buttressing . . . a prima facie case. . . . [S]ince the finding of the indictment presumably imports that the People have legally sufficient evidence of the defendant's guilt of the crime charged . . ., the necessities of appropriate police investigation "to solve a crime, or even to absolve a suspect" cannot be urged as justification for any subsequent questioning of the defendant.'

• • •

"[A]s Judge Knapp pointed out in *United States* v. *Satterfield*, 417 F Supp 293, 296 (SDNY), aff'd, 558 F2d 655 (CA 2, 1976):

" 'Prior to indictment—before the prosecution has taken shape—there may be reasons why a suspect might rationally wish to deal with agents without the intervention of counsel. By getting in their good graces and being useful to the government he might be able altogether to avoid indictment or any legal entanglement. No such opportunity is open to him after a grand jury has spoken. At that point he cannot make any arrangement with agents or prosecutor

that is not subject to ultimate approval by the court, and counsel is obviously important to advise him on what terms such approval is likely to be forthcoming and how best to obtain it.' " *Mohabir, supra,* 624 F2d 1148-1149.[21]

Finally, it is clear that every court has acknowledged that the Sixth Amendment right to counsel is as important, if not more so, than the judicially created Fifth Amendment right to counsel. As such, it is entitled to be protected by procedural safeguards at least as stringent as those designed for its lesser counterpart. We decline to follow the reasoning of those cases which have found valid Sixth Amendment waivers after a request for counsel has been made to a magistrate based solely on waivers of *Miranda* rights. The majority of these cases did not sufficiently distinguish between the concerns underlying the Fifth and Sixth Amendment rights to counsel. As the *Wyer* dissent noted, if a *Miranda* waiver is insufficient to ensure a valid waiver of the Fifth Amendment right to counsel pursuant to *Edwards,* it certainly should be inadequate to ensure a valid waiver of the greater Sixth Amendment right.

C

We need not decide at this time whether stricter procedural standards for waiver of the Sixth Amendment right to counsel are required. We need only hold that, *at a minimum,* the *Edwards/Paintman* rule applies by analogy to those situations where an accused requests counsel before the arraigning magistrate.[22] Once this request occurs,

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[21] See also 82 Colum L R, *supra,* pp. 372-373.

[22] We do not decide under what circumstances the police may interrogate a defendant who has not specifically requested appointed counsel at arraignment, or who has already consulted with counsel. We note only that these defendants must waive both their Fifth and Sixth Amendment rights to counsel before post-arraignment interrogation may proceed.

the police may not conduct further interrogations until counsel has been made available to the accused, unless the accused initiates further communications, exchanges, or conversations with the police.[23] If a defendant chooses to reinitiate communications, he must be sufficiently aware of both his Fifth and Sixth Amendment rights to effectuate a voluntary, knowing, and intelligent waiver of each right. See *Bradshaw, supra,* —— US ——; 77 L Ed 2d 413; *Johnson* v *Zerbst,* 304 US 458, 464; 58 S Ct 1019; 82 L Ed 1461 (1938).

We further hold that before commencing interrogation, the police have an obligation to determine whether an accused has been arraigned and requested counsel. This duty is no more onerous than that imposed by *Edwards* and *Paintman.* As Justice Williams observed in his dissent in *People* v *Esters,* 417 Mich 34, 64; 331 NW2d 211 (1982):

> "[T]he defendant's rights may not be diminished merely because the state fails to respond to defendant's request for counsel, as it should have done. Once he has asked for counsel, the defendant has done all that is within his power to secure this guaranteed right."

We also note that the police officers who were in charge of the investigations in both *Bladel* and *Jackson* were present at the arraignments when defendants requested appointed counsel. Although the officers who later interrogated Bladel were not present at arraignment, Bladel informed them of his request prior to questioning. In both cases, the police were attempting to strengthen their cases

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[23] This rule is consistent with the result reached in *People* v *Green,* 405 Mich 273; 274 NW2d 448 (1979), since defendant there reinitiated further communications with the police. However, we do not suggest that the warnings given in *Green* are sufficient to effectuate a valid waiver of the Sixth Amendment right to counsel. That issue was not presented in *Green* and we need not decide it here.

by conducting "one last round" of interrogation before counsel arrived. Interrogations of defendants who are represented by counsel without counsel's knowledge have been repeatedly criticized. See, *e.g., United States* v *Campbell,* 721 F2d 578, 579 (CA 6, 1983); *United States* v *Cobbs,* 481 F2d 196, 200 (CA 3, 1973), *cert den* 414 US 980; 94 S Ct 298; 38 L Ed 2d 224 (1973); *United States* v *Springer,* 460 F2d 1344, 1353 (CA 7, 1972), *cert den* 409 US 873; 93 S Ct 205; 34 L Ed 125 (1972); *Paintman, supra,* 412 Mich 529-530.

The police cannot simply ignore a defendant's unequivocal request for counsel. As this Court noted in *Paintman, supra*:

> "Of what significance is invocation of a cherished constitutional right if it is ignored by the hearer and, in fact, only seems to exacerbate the defendant's plight? As the time gap increases between the embracing of the right and its fulfillment, the certainty of its existence must surely dim."

In fact, defendant Bladel specifically testified that he began to doubt whether he would have counsel appointed because he did not meet with an attorney until three days after his arraignment. Furthermore, when he asked the jail personnel and the interrogating officers whether counsel had been appointed for him, they repeatedly pleaded ignorance.

Since defendants Bladel and Jackson requested counsel during their arraignments, but were not afforded an opportunity to consult with counsel before the police initiated further interrogations, their post-arraignment confessions were improperly obtained and must be suppressed. Plaintiffs nevertheless maintain that defendants' statements need not be suppressed because they were tried before *Edwards* was decided. In *Solem* v *Stumes,* —— US ——, ——; 104 S Ct 1338; 79 L Ed 2d 579, 59 (1984), the Supreme Court refused to apply *Edwards* retroactively to collateral

reviews of final convictions. The Court, however, specifically declined to decide whether *Edwards* could be applied retroactively to defendants whose convictions were not yet final when the decision was issued.

We need not decide this question since a violation of the Fifth Amendment right to counsel is not involved in either of these cases. We have merely extended the *Edwards/Paintman* rule *by analogy* to cases involving requests for counsel during arraignment, on the basis of our interpretation of both the Sixth Amendment right to counsel and its state constitutional counterpart embodied in Const 1963, art 1, § 20. Given the Supreme Court's holding that *Edwards* established a new "bright line" test,[24] the fact that this Court has not previously articulated precise procedural standards for waivers of the Sixth Amendment right to counsel, and the diverse approaches adopted in other jurisdictions, the rules articulated herein will apply to the instant cases, those cases tried after this opinion is issued, and those cases pending on appeal which have raised the issue.

IV

Defendant Jackson further argues that his six pre-arraignment confessions were inadmissible because the police deliberately delayed arraignment in order to obtain them or the confessions were induced by police threats and promises. The trial court rejected both arguments. The Court of Appeals agreed that the pre-arraignment delay was not used to extract a confession. Defendant was properly advised of his *Miranda* rights before each session and, according to the police officers, he volunteered his statements. 114 Mich App 654-655.[25]

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[24] *Solem, supra,* p. 589; *cf. Paintman, supra,* 412 Mich 530-531.

[25] On appeal to this Court, defendant does not challenge the trial court's findings that he was properly advised of his rights before each statement was given and that he never requested an attorney until arraignment.

A

Although the police had sufficient probable cause to obtain a warrant for defndant Jackson's arrest as a result of codefendant Knight's statements, they did not do so. Defendant was "arrested" on the murder charges on Tuesday, July 31, at 2 p.m. when he was turned over to the Livonia police. Since defendant was arrested for a felony without a warrant, the arresting officers were required to bring him before a magistrate for arraignment without unnecessary delay. MCL 764.13; MSA 28.871(1); MCL 764.26; MSA 28.885; *People* v *Mallory,* —— Mich ——; —— NW2d —— (1984) (slip op, p 5); *People* v *White,* 392 Mich 404, 424; 221 NW2d 357 (1974), *cert den sub nom Michigan* v *White,* 420 US 912; 95 S Ct 835; 42 L Ed 2d 843 (1975). Immediate arraignment is not required, however. Circumstances may require a brief delay for "booking," a quick verification of the accused's volunteered "story," or a brief questioning to determine the immediate question of release or complaint. *Mallory* v *United States,* 354 US 449, 454-455; 77 S Ct 1356; 1 L Ed 2d 1479 (1957); *People* v *Hamilton,* 359 Mich 410, 416-417; 102 NW2d 738 (1960). Even where an unnecessary delay has occurred, admissions or confessions obtained during this period will not be excluded unless the delay was employed as a tool to extract the statement. *Mallory, supra,* —— Mich —— (slip op, p 5); *White, supra.*

Defendant was not arraigned until August 1 at 4:30 p.m., approximately 26½ hours after his arrest. He was first interrogated shortly after arriving at the Livonia police station. The police initially obtained background information from defendant and informed him of his rights, the

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Our independent review of the record does not disclose that these findings are clearly erroneous.

Since the trial court found the police officers to be more credible, the following discussion of the facts is based upon the officers' testimony at the *Walker* hearing.

nature of the charges against him, and the mandatory punishment of life imprisonment for first-degree murder. They then confronted him with Knight's statement that defendant and another person had committed the murder. At approximately 3:30 p.m., defendant admitted that he was present during the murder, but maintained that Knight was with him and had shot the victim.

We conclude that this first oral statement was not obtained during a period of unreasonable delay. The officers' questioning occurred 1½ hours after the arrest and was for the purpose of determining whether Knight had unjustly accused defendant.

Sergeant Richard Ericson, another officer in charge of the case, testified at the *Walker* hearing that after this first confession, the police had sufficient information to obtain an arrest warrant against defendant. Sergeant Hoff testified similarly, but explained that they could not have obtained a warrant because the prosecutor's office was closed and there was no one available to authorize the warrant request. Shortly after the first statement was given, the police asked defendant to repeat his statement so that it could be tape-recorded. Defendant agreed. The recording began at 5:52 p.m. However, the quality of the recording was so poor that the police asked defendant to repeat the statement again. The second taping began at 8:48 p.m. The content of these two recorded statements did not substantially differ from that of the prior oral statement.

Giving the police the benefit of the doubt, we conclude that no unreasonable delay occurred between the arrest and the time these two taped statements were given. If any unreasonable delay occurred, it was not used to extract a new statement, but merely to memorialize the first oral statement.[26]

[26] However, our conclusion in no way condones the officers' actions. Defendant's first confession, when coupled with Knight's statement, presented more than enough evidence to arraign defendant for conspiracy and first-degree murder. The only purpose in recording defendant's statement was to strengthen the prosecution's case against him and his co-defendants prior to arraignment. The result in this case might have been different if the first oral statement had been obtained earlier in the day, if it had materially differed from the subsequently recorded statements, or if the recorded statements were the product of more intensive interrogation.

After the second taped statement, defendant was confronted by the fact that his version still differed from Knight's, *i.e.*, defendant claimed that he and Knight were present but that Knight was the shooter, while Knight claimed that defendant and White committed the murder. The police noted that Knight had agreed to undergo a polygraph examination the following morning and requested that defendant undergo one also. Defendant agreed.

The examination began at approximately 10 a.m. The polygraph examiner informed defendant of his rights and that he did not have to submit to the exam. Defendant still agreed to the polygraph. Afterwards. the examiner informed defendant that he had not been truthful and urged him to tell the other officers the truth in order to maintain his credibility. Defendant then confessed to the examiner that he had shot the victim and that White, not Knight, had been present. The examiner immediately informed Sergeant Hoff, who was waiting outside the polygraph room. Shortly thereafter, Sergeant Hoff met with defendant, advised him of his rights, and obtained substantially similar oral and written statements.

Primarily on the basis of the officers' testimony at the *Walker* hearing, we conclude that the three post-polygraph statements were obtained during an unnecessary pre-arraignment delay and that the delay was employed as a tool to extract these statements. Sergeant Hoff testified that if an arrest warrant had been issued during the morn-

ing of August 1, defendant could have been arraigned at that time, except for the polygraph exam. Sergeant Ericson testified that he began preparing the 36-page warrant request for all four defendants at 9:30 a.m. on August 1, and finished at 1 p.m. On cross-examination, however, he stated that he had previously prepared a request and obtained a warrant for codefendant Perry. The warrant requests for Perry and defendant were substantially similar, except for the information concerning Knight's statements, and defendant's pre- and post-polygraph confessions. Sergeant Ericson thereafter presented the request to the prosecutor's office, obtained the complaints and warrants, and arrived at the Livonia District Court at approximately 4:30 p.m. for the arraignment.

Although the thoroughness with which the warrant request was prepared may be commendable, the police cannot justify infringing upon a defendant's statutory and constitutional rights to a prompt arraignment merely on the grounds that their "paperwork" has not yet been completed. A contrary conclusion would encourage dilatory efforts in seeking and obtaining the prosecutor's authorization. It must be remembered that a magistrate is required to issue an arrest warrant upon presentation of a proper complaint alleging the commission of an offense and upon a finding of reasonable cause to believe that the accused committed the offense. MCL 764.1a; MSA 28.860(1). The complaint need not contain every fact which contributed to the affiant's conclusions, nor must every factual allegation be independently documented. The complaint simply has to be sufficient enough to enable the magistrate to determine that the charges are not capricious and are sufficiently supported to justify further criminal action. *Jaben* v *United States*, 381 US 214, 224-225; 85 S Ct 1365; 14 L Ed 2d 345 (1965); *United States* v *Fachini*, 466 F2d 53, 56 (CA 6, 1972). In addition, a complaint may thereafter be amended if additional evidence so requires. The police and the prosecutor here had sufficient evidence to draft a

complaint and obtain a warrant before or shortly after defendant was arrested. There was no need, for purposes of arraignment, to determine whether Knight or defendant was telling the truth.

The delay was used as a tool to extract the three post-polygraph statements. Sergeants Ericson, Hoff, and Garrison all testified that they asked defendant to submit to a polygraph so that they could determine whether he was telling the truth. Although they did not specifically instruct the examiner to obtain a statement, Sergeant Hoff testified that they had hoped to obtain another statement if defendant's original confession proved inaccurate. The police were obviously attempting to strengthen their case against all four defendants, particularly White, who had not yet confessed to any involvement. The three post-polygraph confessions therefore were not admissible.[27]

B

After reviewing the record, we conclude that the trial court did not clearly err in finding that defendant's three

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[27] Plaintiff suggests that even if an unnecessary pre-arraignment delay occurred, the ultimate test for purposes of the exclusionary rule is whether the statement obtained was voluntary or coerced. See, *e.g.*, *People* v *Wallach*, 110 Mich App 37, 59, fn 5; 312 NW2d 387 (1981), *vacated and remanded on other grounds* 417 Mich 937; 331 NW2d 730 (1983); *People* v *Antonio Johnson*, 85 Mich App 247, 252-253; 271 NW2d 177 (1978). Although earlier decisions of this Court could be interpreted in this manner, see, *e.g.*, *People* v *Farmer*, 380 Mich 198; 156 NW2d 504 (1968); *People* v *Ubbes*, 374 Mich 571; 132 NW2d 669 (1965); *People* v *Harper*, 365 Mich 494; 113 NW2d 808 (1962); *Hamilton, supra*, an examination of *White, supra*, 392 Mich 424-425, reveals that this Court now treats the question of pre-arraignment delay apart from the issue of voluntariness. If voluntariness were the only relevant inquiry, there would be no reason to analyze whether a pre-arraignment delay occurred and was used as a tool, since involuntary statements have always been held inadmissible regardless of when they are obtained. Prompt arraignment serves several important functions apart from preventing improper custodial interrogations. See *Mallory, supra*, —— Mich —— (slip op, p. 5).

pre-polygraph confessions were not improperly induced by threats or promises.[28] In light of our prior conclusion that the post-polygraph confessions are inadmissible, we need not determine whether they were the product of threats or promises. Although defendant's three pre-polygraph confessions implicated him in the murder at least as an aider and abettor, a new trial is required. Defendant testified before the jury that he did not make the first oral statement and that the two taped confessions were induced by police threats and promises. The cumulative effect of admitting seven confessions, as opposed to three, may have made a difference in the jury's determination of credibility.

V.

The decision of the Court of Appeals is affirmed in *Bladel* and reversed in *Jackson*. These cases are remanded to the trial court for further proceedings consistent with this opinion.

/s/ MICHAEL F. CAVANAGH
/s/ [Illegible]
/s/ CHARLES L. LEON
/s/ THOMAS GILES KAVANAGH

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[28] A review of the police officers' testimony reveals that if any threats or promises were made to defendant, they occurred after the second taped statement. Sergeant Ericson testified that he told defendant after the second taped statement that the police were primarily after Ms. Perry. Leniency was not mentioned until after the post-arraignment statement. Sergeant Garrison stated that defendant may have mentioned not wanting to go to jail on July 31, but he was informed that the police could not authorize pleas to less serious offenses. Sergeant Hoff testified that no one discussed pleas on July 31. He did mention the possibility of a plea to second-degreee murder if defendant cooperated and if the prosecutor agreed. However, this discussion occurred after the polygraph examination.

7-8 April 1984

STATE OF MICHIGAN
SUPREME COURT

No. 69749

PEOPLE OF THE STATE OF MICHIGAN, *Plaintiff-Appellant,*

v

RUDY BLADEL, *Defendant-Appellee.*

No. 69615

PEOPLE OF THE STATE OF MICHIGAN, *Plaintiff-Appellee,*

v

ROBERT BERNARD JACKSON, *Defendant-Appellant.*

BEFORE THE ENTIRE BENCH

RYAN, J. *(concurring in part and dissenting in part).*

I concur in part III-C of my brother Cavanagh's opinion with the exception, however, that since the *Edwards/Paintman* ruling derives from an analysis of the United States Constitution, I find it unnecessary and, indeed, inappropriate to base the result in these cases upon Const 1963, art 1, § 20.

I do not agree, however, that the record in this case supports my brother's conclusion that the "post-polygraph" statements given by defendant Jackson are inadmissible for the reason stated. In my judgment, it is mere appellate speculation to conclude that the failure to arraign defendant Jackson during the morning of August 1 was "unnecessary pre-arraignment delay and that the delay was employed as a tool to extract these statements." That conclusion carries with it the implicit charge that the Livonia police contrived to lawlessly delay the defendant's arraignment on the mere pretext of completing unneces-

sary "paperwork," but for the actual purpose of extracting more confessions from him knowing that procedure to be improper. In my judgment, that conclusion is unsupported in the record.

This Court's opinion at this appellate remove, four and one-half years after the event, that the Livonia police may have had enough evidence at 9:30 a.m. on the morning of August 1 to obtain a recommendation for a warrant from an assistant Wayne County prosecuting attorney, and in turn to obtain an arrest warrant from a district judge, without benefit of further interrogation of Jackson, might be correct. If so, the conclusion that it was unnecessary to delay defendant Jackson's arraignment until the afternoon might likewise be correct. It does not follow therefrom, however, that the decision of the Livonia police to proceed with the preparation of a 36-page warrant request, to conduct a polygraph examination to which the defendant Jackson had agreed the night before, and to question Jackson following the failed polygraph examination, decisively demonstrate that the officers unnecessarily delayed arraigning Jackson as a ruse to "extract the post-polygraph statements." It is equally plausible, on the record before us, that the officers honestly believed that they were insufficiently prepared to request and obtain a warrant in this major "murder for hire" case until the statutorily required warrant request was properly completed and approved, the previously scheduled polygraph examination was completed, and the defendant was afforded the opportunity to reconcile, if he wished to, the conflicts it revealed. See *United States* v *Lovasco*, 431 US 783, 791; 97 S Ct 2044; 52 L Ed 2d 752 (1977) ("[P]rosecutors are under no duty to file charges as soon as probable cause exists but before they are satisfied they will be able to establish the suspect's guilt beyond a reasonable doubt").

/s/ James L. Pugh

/s/ James H. Brickley

7-8/April 1984

STATE OF MICHIGAN
SUPREME COURT

No. 69749

People of the State of Michigan, *Plaintiff-Appellant*,

v

Rudy Bladel, *Defendant-Appellee*.

No 69615

People of the State of Michigan, *Plaintiff-Appellee*,

v

Robert Bernard Jackson, *Defendant-Appellant*.

Boyle, J. *(dissenting)*.

In *People* v *Jackson*, I concur with the part of Justice Ryan's opinion regarding the post-polygraph statements. I would also find that appellant Jackson's post-arraignment statement, which it is undisputed was a repetition of the verbal and written statement given on August 1 in which the defendant confessed that he was the shooter, was, in light of the overwhelming evidence, if error, harmless beyond a reasonable doubt. *Chapman* v *California*, 386 US 18; 87 S Ct 824; 17 L Ed 2d 705 (1967). I would find in *People* v *Bladel* that the Sixth Amendment right to counsel, which the people concede had attached, was waived. *Brewer* v *Williams*, 430 US 387; 97 S Ct 1232; 51 L Ed 2d 424 (1977), itself permits waiver. In concluding that waiver did not occur, Justice Stewart for the majority noted, "The Court of Appeals did not hold, nor do we, that under the circumstances of this case, Williams could not, without notice to counsel have waived his rights under

the Sixth and Fourteenth amendments." *Id.*, pp. 405-406. Justice Stewart further emphasized that the detective "did not preface this effort [to elicit a response] by telling Williams that he had a right to the presence of a lawyer, and made no effort at all to ascertain whether Williams wished to relinquish that right." 430 US 405. In *Bladel* it is clear that when the defendant mentioned he had asked for an appointed attorney he was asked if he wanted an attorney present and the defendant stated that he did not need one. I would find an intentional relinquishment of a known right.

While I recognize both the importance of the Sixth Amendment right to counsel and the appeal of the symmetrical application of *Edwards* v *Arizona*, 451 US 477; 101 S Ct 1880; 68 L Ed 2d 378 (1981), and *People* v *Paintman*, 412 Mich 518; 315 NW2d 418 (1982), I am unconvinced without further guidance from the United States Supreme Court that we are constitutionally obligated to reach this result.

/s/ PATRICIA J. BAGLE

APPENDIX B

CIRCUIT COURT OPINION

THE COURT: All right, thank you. Well, as to the interrogation of January 1, 1979, the Court finds that the prosecution has borne the burden of showing that that was a voluntary statement such as it was based upon the proper [108] advice of the defendant or to the defendant of his Miranda rights and that he knowingly and voluntarily, orally waived them. And, the same applies as to the statement interrogation of January 2, 1979.

As to the statements and confessions of March 26, 1979, the Court also finds that the rights were properly given to the defendant and that he knowingly waived them after acknowledging that he understood them.

Now, I understand the position of the defendant to the effect that he did demand counsel on March 23rd at his arraignment in District Court. Now, whether or not counsel was appointed by March 26th, incidentally, March 23rd, 1979 was a Friday and March 26th, 1979 was a Monday. And, whether or not counsel had been appointed and had an opportunity to consult with the defendant before the interrogation does affect the voluntariness and the affectiveness of the waiver of the rights.

Now, I don't know of any case why counsel had been appointed but hadn't had a chance to consult with the defendant before he was again interrogated and didn't have a chance to either advise the defendant the he shouldn't say anything or that he should not say anything without the presence of counsel. But, there is no case that I know of that says Miranda goes that far and so the holding is that the testimony or the substance of the statements of all [109] three occasions and the confessions will be admissible.

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APPENDIX C

MOTION TO SUPPRESS OR IN ALTERNATIVE FOR A WALKER HEARING

[Filed July 3, 1979]

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR
THE COUNTY OF JACKSON

File No. 79-017105-FY

THE PEOPLE OF THE STATE OF MICHIGAN, *Plaintiff*

vs.

RUDY BLADEL, *Defendant*

Hon. Russell E. Noble

COMES Now Rudy Bladel, by and through his attorney, Douglas L. Williams, and hereby moves this Court to suppress the confession given to police officers or in the alternative, that the Court will hear evidence given to support a factual basis to suppress the aforementioned confession and in support gives the following:

That the defendant was arrested in Elkhart, Indiana, on March 22, 1979, and charged with the murder of three Conrail employees on or about December 31, 1978.

That he was returned to Jackson, Michigan on March 22, 1979 and arraigned before the Honorable Robert Crary, Jr., District Judge for the 13th District on March 23, 1979. (See Transcript of 13th District Court Arraignment.

That on March 23, 1979, the Court inquired as to the Defendant's intentions for retaining an Attorney (AT PP 4)

That the defendant answered the Court and did then and there declare his indigency and request Court Appointed Counsel. (AT PP 4, L-]6).

That this Court Appointed the Law Firm of Adams, Goler & Williams by letter dated March 23, 1979.

That the District Court set the preliminary examination date for April 3, 1979.

That on January 1, 1979 the defendant was arrested, given his rights, and informed of his right to counsel, and questioned TP]37

That the defendant refused to answer questions on January 1, 1979.

That the defendant was again questioned on January 3, 1979 and informed of a right to counsel and at such time no statement was given.

That at 9:25 on March 22, 1979, the defendant was given his rights and again questioned and the defendant did not confess any crime.

That the defendant was again questioned on March 26, 1979, at]2:42 p.m. He was advised of his right to counsel but none was present.

That the defendant gave a confession after questioning on March 26, 1979, without the benefit of counsel that he had requested on March 22, 1979.

That the letter appointing Adams, Goler & Williams was received on March 27, 1979 at 11:45 a.m.

WHEREFORE the defendant moves this honorable court that the confession taken on March 26, 1979 be suppressed and ordered not used in the trial in this matter or in the

alternative, that this court order that evidence be submitted to determine the voluntariness of the said confession.

/s/ DOUGLAS L. WILLIAMS
Douglas L. Williams
Attorney for defendant
715 West Michigan Avenue
Jackson, Michigan, 49201
787-8343

APPENDIX D

DIGEST OF CONFLICTING CASES

United States v *Clements,* 713 F2d 1030 (Fourth Circuit 1983). (Post indictment confession. Remand to District Court to determine if Defendant had been informed of the existence of the indictment against him. Apparently, Miranda warnings plus informing of existence of indictment is necessary Sixth-Amendment waiver.)

United States v *Estelle,* 604 F2d 983 (Fifth Circuit 1979). (Defendant requested court appointed counsel at arraignment. Subsequent police initiated interrogation was proper. Request for counsel at arraignment did not indicate a desire not to speak to police. Miranda rights given and waived. Confession properly admitted, request for counsel at arraignment does not bar police interrogation nor did an interrogation impinge on exercise of Defendant's rights.)

State v *Wyer,* 320 SE2d 93 WVa (1984). (Defendant arraigned by a Magistrate and requested counsel. Held: Defendant can waive Sixth Amendment right to counsel in absence of counsel. Sixth Amendment waiver is higher standard requiring Miranda warning, written waiver and Defendant must be informed he is under arrest and be informed of each of the charges against him. General Request for counsel at arraignment does not invoke Fifth Amendment right triggering *Edwards* v *Arizona.*)

United States v *Madley,* 502 F2d 1103 (Ninth Circuit 1974). (Interrogation by Federal agents in absence of Defendant's counsel appointed in state parole violation proceedings did not violate the spirit of *Massiah* v *United States.*)

Fields v *Wyrick,* 706 F2d 879 (Eighth Circuit 1983). (Three months after being charged, Defendant took a polygraph on counsel's advice. The polygraph showed decep-

tion, Defendant made inculpatory statements in explaining deceit. Defendant had been advised of Miranda rights and signed a waiver. Held: In context of case, waiver of either the Fifth or Sixth Amendment right to counsel is judged by same standard, waiver of Miranda rights was voluntary, knowing and intelligent abandonment of Sixth Amendment right to presence of counsel.)

Coughlan v *United States,* 391 F2d 371 (Ninth Circuit 1968). (Defendant was interrogated by police after appointment of counsel. The police were aware of appointment. Defense argues confession only knowing and truly voluntary when counsel is present to advise client. Held: Right to counsel can be waived in absence of counsel and was waived in the instant case.)

United States v *Brown,* 569 F2d 236 (Rehearing en banc reversing 551 F2d 639). (Fifth Circuit 1978). (Defendant charged under the state statute and appointed counsel. Federal agents interviewed Defendant at the courthouse on related federal charges. Defendant advised of and waived Miranda rights. Held: Waiver of Miranda warnings sufficient to waive any right to counsel therefore Sixth Amendment rights not violated.)

United States v *Payton,* 615 F2d 922 (First Circuit 1980). (Post-indictment, pre-arraignment confession. Miranda rights stated and waived. Defendant aware of indictment. Held: Miranda rights sufficient for Sixth Amendment waiver.)

Robinson v *Percy,* 738 F2d 214 (Seventh Circuit 1984). (Defendant arrested in New Hampshire on Wisconsin murder. After some interrogation and request for counsel, interrogation ceased. Police then reinitiated interrogation. Motion to Suppress denied. Habeas Corpus dismissed where advice and waiver of Miranda warnings amounted to waiver of Sixth Amendment right to counsel. The court analyzed waiver of Sixth Amendment right to counsel on individual

circumstances of each case.) (See also: *State* v *Norgaard,* 653 P2d 483 (Mont. 1982) and *State* v *Burbine,* 451 A2d 22 (R.I. 1982)).

United States v *Campbell,* 721 F2d 578 (Sixth Circuit 1983). (Defendant taken before a Magistrate after arrest, and was appointed counsel. Secret Service then took the Defendant to their office where they interrogated him without the presence of court appointed counsel. Secret Service agents were present when Magistrate advised Defendant of Miranda rights. The Court found indifference to Defendant's right to counsel and a Fifth Amendment violation under *Edwards.*)

State v *Sparklin,* 296 Oregon 85, 672 P2d 1182 (1983). (Defendant confessed during police initiated interrogation subsequent to Defendant's request for court appointed counsel at arraignment. Mianda rights were given and waived. The Court ruled the request to be invocation of Sixth but not Fifth Amendment right to counsel. Held: No interrogation by police can be proper after Sixth Amendment request for counsel without notice to counsel giving him a reasonable opportunity to attend.) (672 P2d at 1187).

United States v *Brown,* 699 F2d 585 (Second Circuit 1983). (Post-indictment, pre-arraignment and appointment, government initiated interrogation. Miranda rights given and waived. Held: Warnings under Miranda insufficient to meet higher standard for waiver to right to counsel under Sixth Amendment.)

Silva v *Estelle,* 672 F2d 457 (CA 5 1982). (State Court Defendant arraigned and requested permission to call his lawyer. At arraignment, *Magistrate informed Defendant of his Miranda rights.* Officer present at arraignment questioned Defendant immediately after arraignment. Held: Re-interrogation after invocation of right to counsel following Miranda rights violated *Edwards* v *Arizona.* The

court misconstrued *Edwards* to apply to Sixth Amendment cases as well as Fifth Amendment cases.)

United States v *Satterfield*, 558 F2d 655 (Second Circuit 1976). (Confession after arraignment and request for counsel violated Sixth Amendment right by failure to reach the higher standard of waiver.)

United States v *Mohabir*, 624 F2d 1140 (Second Circuit 1980). (Post-indictment statement made to Prosecutor. Miranda warnings are insufficient for higher standard waiver for Sixth Amendment rights. Defendant must understand the significance of indictment and the gravity of his position. *Exercising supervisory powers,* in light of the practice in the Second Circuit, apparently in violation of the Code of Professonal Responsibility, the court now requires full comprehension of rights by Defendants and advice of warnings by a judicial officer rather than by the Prosecutor.)